# Practice common-placed: 15

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# RULES and CASES

OF

#### PRACTICE

IN THE COURTS OF

# Bing's Bench and Common Pleas,

METHODICALLY ARRANGED.

By GEORGE CROMPTON, Esquire, of the INNER TEMPLE.

VOLUME THE SECOND.

THE SECOND EDITION,

Much enlarged, and improved with feveral new Titles.

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# Of proceeding against Prisoners.

CORMERLY by the practice of the respective courts, when a defendant was arrested upon mesne process, and for want of bail was committed to gaol, unless the plaintiff, before the end of two terms after the arrest, caused the desendant, by writ of babeas corpus, to be removed, to be charged with a declaration: such prisoner upon common bail, or appearance by attorney, was discharged

from his imprisonment.

But by 4 & 5 W. and M. c. 21. it is enacted, " That where any defendant, or defendants, be taken, or charged in custody, at the suit of any person or persons, upon any writ\* or writs, out of any of the faid courts at Westminster, and imprisoned or detained in prison, for want of sureties for their appearance to the fame, the plaintiff or plaintiffs, in fuch writ or writs, shall, and may by virtue of the faid act, before the end of the next term after such writ or process shall be returnable, declare against such prisoner or prisoners, in the respective court or courts out of which the writ or writs shall iffue, whereupon the said prisoner or prisoners shall be taken and imprisoned, or charged in custody; and shall and may cause a true copy thereof to be delivered to such prifoner or prisoners, or to the gaoler or keeper of the prison or gaol, in whose custody such prisoner shall be or remain; to which declaration or declarations, the faid prisoner or prifoners shall appear and plead; and if such prisoner shall not appear and plead to the same, the plaintiff or plaintiffs, in fuch cases, shall have judgment in such manner as if the prifoner or prisoners had appeared in the faid respective courts, and refused to answer or plead to such declaration."

<sup>\*</sup> But if the ac etiam of the writ be debt, you cannot declare in case on that writ, per all the officers; because the statute says, that you shall declare on such writ, Sed quære?

Vol. II.

And

And by sect. 3. it is further enacted, "That in all declarations against any prisoner or prisoners, detained in prison by virtue of any writ or process, issued out of the court of King's Bench, it shall be alledged in custody of what sherist, bailist, or steward, of any franchist, or other person, having the return and execution of writs, such prisoner or prisoners shall be at the time of such declaration, by virtue of the process of the said court, at the suit of the plaintists; which allegation shall be as good and effectual, to all intents and purposes, as if such prisoner or prisoners were in the custody of the Marshal of the Marshaller of the prisoner of the said that the said tha

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Upon the foregoing statute of W. & M. the Judges of the respective courts made the following rules: East. 5 W.

In B. R.

1. That no copy of a declaration be delivered to any prisoner in custody, before the day of the return of the process upon which the defendant was taken or charged

in cuffody.

- 2. That no rule be given for the defendant in custody to appear and plead to any declaration against him, until an affidavit be filed with the clerk of the rules, of the delivering a copy of fuch declaration, and of the time when, and the person to whom, the said copy was delivered; and that the defendant was arrested, or charged in cuffody, by process out of this court, returnable before the delivery of fuch copy; and that the time of filing fuch affidavit, be entered upon the affidavit by the clerk of the rules; and that a copy of luch affidavit be produced to the prothonotary or fecondary before the figning the judgment.
  - 3. If a copy of the declaration be delivered against such defendant, before "one month of Easter," or, "the morrow of All Souls," and assidavit be made thereof and filed, and the defendant doth not appear before the end of

In C. 23.

- 1. No copy of a declaration shall be delivered to any prisoner, until after the process, upon which such prisoner shall be taken or charged in custody, be returnable.
- 2. No rule shall be given for the defendant, in custody, to appear and plead to any declaration against him, until an affidavit be filed, with the proper secondary, of the delivery of the copy of fuch declaration, and of the time when, and the person to whom, the faid copy was delivered; and a copy of the faid affidavit shall be produced to the prothonotary before judgment figned, together with a certificate from the proper officer that no appearance is entered with him.
- 3. If a copy of a declaration be delivered before menfem Paschæ, or crastinum animarum, and assidavit thereof be made and filed; and the desendant doth not enter his appearance with the proper officer within ten days after

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Eafter

In 13. 1. ten days after Eafter and Michaelmas term respectively, judgment may be entered against him, if rules have been given; but if he doth appear before the end of ten days after the term, he shall imparl until the next term, funless the action be in London or Middlefex ] and the defendant be in prison within forty miles of London or Westminster; then, though he doth appear before the expiration of ten days, after the end of the term, he shall plead two days before the Essoign Day of the next term; and in default thereof, rules for pleading having been given] judgment may be entered against him as aforefaid.

4. If a copy of the declaration be delivered against fuch defendant, on or before "one month of Easter," in Easter term, or, "the morrow of All Souls," in Michaelmas term, or in Hilary, or Trinity term, and thereupon the plaintiff gives a rule to appear and answer; then, if the defendant appears two days before the Effoign Day of the next term, he thall imparl until the faid next term; but if he doth not appear within that time, judgment shall be given against him.

5. If a writ be returnable in any term, and a copy of the

In C. B. Easter or Michaelmas term. respectively, judgment may be entered against him, upon fuch certificate, if rules have been given; but if he does not enter his appearance as aforefaid, within ten days after such term, he shall imparl until the next term, unless the action be in London or Middlefex, and the defendant be in prison within forty miles of the cities of London or Westminster; and then, though the prisoner doth appear within ten days after the end of the term, he shall plead two days before the Effoign Day of the next term; and in default thereof, rules having been given, judgment may be entered against him as aforesaid.

4. If a copy of the de-claration be delivered on or after mensem Paschæ in Easter term, or crastinum animarum in Michaelmas term, or in Hilary term or in Trinity, and the plaintiff shall thereupon give a rule to appear and plead; if the defendant enters his appearance two days preceding the Effoign Day of the next term, he shall imparl until the next term; but if he shall not appear within that time, judgment may be entered against him as aforesaid.

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5. If the writ be returnable in one term, and a copy

In 2B. 1R. declaration has been delivered before the Effoign Day of the next term, the plaintiff, in such next term, may give rules to appear and plead; and if the defendant does not appear and plead, upon the expiration of the rules, judgment shall be given against him.

6. If the declaration be not filed before the end of the next term, after the writ or process by which the prisoner was taken or charged in custody, is returnable, and affidavit made and filed in manner as aforesaid, before the end of forty days next, after such term, the prisoner shall be discharged by common bail, signed by one of the justices of this court.

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7. If any gaoler or keeper of a prison, having received a copy of a declaration against any prisoner in his custody, shall suppress the same, and not deliver it forthwith unto such prisoner, an attachment shall be issued against him.

In C.B. of the declaration be delivered before the Essoign Day of the next term, the plaintist in such declaration, may give a rule to appear; and if the defendant doth not enter his appearance, and plead by the time the rules are out, judgment may be entered against him.

6. If the declaration be not entered, or left in the office, before the end of the next term, after the return of the writ or process, [by which the defendant shall be taken or charged in custody] and an affidavit made and filed in manner aforesaid, before the end of twenty days after fuch term [Easter term excepted, and within ten days after Easter term] the prifoner shall be discharged, upon entering his appearance with the proper officer, by writ of supersedeas made by him according to the ancient practice of this court.

7. If any gaoler or keeper of any prison, having received a copy of a declaration against any prisoner in his custody, shall suppress the same, or not deliver it forthwith to such prisoner, an attachment shall be entered against him.

A prisoner committed for a contempt, cannot be charged with a declaration, without leave of the court. Pract.

But if he accepts a declaration, and suffers plaintiff to take judgment, he has no remedy. R. and O. B. R. and C. B. 2 vol. 31.

B 3

One in custody, on an attachment, cannot be charged in execution, without leave. Pract. Reg. 825.

A prisoner in custody on a criminal account, cannot be charged with a civil action, without leave of the court. Salt.

But a prisoner on a charge of felony, may be charged with a latitat. Daintree v. Justice. Hil. 9 Geo. 3.

A person attainted even of high treason, may be charged with a civil action, by leave of the court. Ramfden and ano-

ther, y. Macdonald. 1 Will. 217.

The court will not give leave to charge a prisoner with an action, who has a pardon upon condition of transportation, because it would defeat the effect of the pardon, and render the prisoner incapable of performing the condition on which he was pardoned, Ld. Raym. 848.

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I F a defendant, upon being arrested, cannot find bail, but goes to prison, and does not remove himself by habeas corpus, or the plaintiff does not remove him by habeas corpus into the prison of the court, the plaintiff may declare against

him in the cultody of fuch Sheriff or Bailiff.

In such case of a desendant's remaining in actual custody for want of bail, the plaintist in either court must declare against him within two terms; otherwise if the suit be in B.R. desendant will be discharged on siling common bail signed by one of the Judges, without any notice given to the plaintist or his attorney. And if the suit be in C.B. desendant may procure his discharge at the expiration of that time by a supersedeas, to be allowed by one of the Judges, unless cause be shewn to the contrary, upon notice being given to plaintist or his attorney. Vide Reg. Mich. 1654. & Tr. 2 Geo. 1. B.R.

In C. B. upon a supersedeas, for want of declaring within two terms, common bail must be filed of the term the superse-

deas issued. Reg. 14, 15 Car. 2.

Master Benton thought, that if desendant did not supersede himself till the third term, and filed common bail as of that term, yet he was not obliged to accept a dedlaration; but quære, if common bail should not be filed as of the second term, as it is in C. B.

Mr. Cowper, clerk of the rules in B.R. had some doubt, whether a prisoner, superseded on filing common bail, might not sign a nonpros as soon as common bail filed, because plaintiff had not declared within the two terms; but this seems impossible; though there can be no doubt that he might sign such nonpros at the end of the two terms after bail filed.

<sup>\*</sup> But if the prisoner is in custody by virtue of process from the King's Bench, that is, process of bill or lainat, plaintiff must express in his declaration, in whose custody defendant is, by virtue of the process at the suit of the plaintiff, which shall be as effectual as if defendant was in the custody of the Marshal.

In 18. 18.

A writ was returnable first return of Michaelmas term, defendant was arrested in Trinity vacation, and the declaration was delivered in Hiliary; and the court held it bad, for plaintiff should have declared before the end of Michaelmas. Pitt, Yalden, Eaft. 7 Geo. 3. B. R. Burr.

Rep. 4 pt. 2060. So where the writ was taken out four days before the end of Easter, returnable the last return of Trinity following, the arrest being within two days of the end of Easter. Defendant remained in prison in custody of the Sheriff till after Trinity, without being charged with a declaration. He then applied to a Judge to be discharged on filing common bail; and it being moved in court, he was ordered to be discharged on filing common bail, according to the rule. Tr. 2 Geo. 1. Pullen & White. Burt. Rep. 4 pt. 1448.

held also, that a defendant otherwise. Plaintiff not having

It is held in this court, that In this court it is held that, the term in which the writ a prisoner is not supersedable whereon defendant was ar- for want of a declaration, till rested, is returnable, (although the end of the term after that it be not returnable till the in which the process is returnlast day of the term) is one able, not that in which he is of the two terms within the arrested. Mich. 19 Geo. 3. foregoing rule. 2 Blacks. Rep. 1242.

The King's Bench have In the Common Pleas it is prisoner, although supersedable, declared against defendant, a

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In B. R. but not actually superfeded, if found in custody, may be charged with a declaration. Hutchings & Kenrick. Burr. Rep. 4 pt. 1048.

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T. Block Ron 1222. For

In C. 13. prisoner, before the end of the fecond term, the defendant took out a Judge's fummons for a Supersedeas, 28 of Oct. and plaintiff's agent had time to write to his client; not being able to shew cause against it, a supersedeas was ordered on the 11th of Nov. but could not be fealed that night, but on the 13th was fent into the country. The plaintiff after the fummons ferved, viz. 1/1 of Nov. charged defendant in custody with a declaration, and on the 13th figned judgment, fent down a testat. ca. fa. and charged him in execution. The court held plaintiff's proceedings, subsequent to the time of defendant's being supersedable and having applied for a supersedeas to be irregular, and let aside the ca. fa. with costs, on defendant's confenting not to bring an Barnes, 400. action.

Neither court will grant plaintiff a rule for time to de-

clare against a prisoner. Prac. Reg. 327.

But where in a writ against three, one was arrested and lay in gaol, and the other two absconded, the court resused to discharge the prisoner, saying that he must appear for all, or lie in gaol till the other two are outlawed; but in such case, plaintist must move for time to declare against him in custody. East. 12 Geo. 3.

So where in an action against two, and one defendant was committed to the fleet, and charged with the action for want of bail, and the other absconded, so that the plaintiff was not able to bring him into court by arrest, and therefore took out process of outlawry against him, which unavoidably over-run the time for declaring, viz. the two terms. The court thought

thought it reasonable as the plaintiff could not declare against the other, he neither being outlawed, nor in court, to allow a further time to declare. Barnes, 401. But in fuch case the court will expect plaintiff to shew, that he has used all diligence

More than two terms had expired after the prisoner was in cuftody, and before the plaintiff declared; and it was moved, that the prisoner might be discharged by supersedeas, the plaintiff having neglected to declare within the two terms. On thewing cause, it appeared by affidavits, that there had been a treaty of accommodation between the plaintiff and the defendant; and that breaking off, then the plaintiff declared; and the court held, that while a treaty subsists between plaintiff and defendant a prisoner, the plaintiff is not obliged to declare within the two terms, according to the practice; for it is for the prisoner's benefit, that plaintiff liftens to proposals of accommedation. 3-Will. 455.

The court of B. R. retuled to discharge a prisoner out of custody, for want of proceeding against him within two terms, a mistake having arisen from two persons being of the same

name. Loft, 274.

The plaintiff had two different causes of action against defendant, one as administrator, the other as assignee. Defendant was arrested at plaintiff's fuit as administrator; but in the title of the affidavit for bail, administrator was omitted, though put in the writ. Defendant remained in custody for want of bail, and the plaintiff did not declare as administrator, agreeable to his writ, but made a new affidavit of his other demand as affignee, and delivered a declaration in the county gaol inderfed for bail. The rule to thew cause why a superfedeas, &c. in the first cause, was made absolute, the affidavit being a nullity: but the arrest in the second cause was held not to be at the suit of anothere free aboth Barnes, 391.

But where plaintiff arrested defendant as executris, and finding the action wrong as executrix, made a new affidavit for bail, and charged defendant with a new declaration in her own right: and upon defendant's moving for a common appearance and supersedens, the court held, that if there had been two different causes of action, the second declaration would have been a good charge: but there being but one and the fame cause of action, the proceedings were irregular, and made the rule absolute to fet afide the proceedings. Barnes, 301.

The defendant was arrested by writ returnable in Mich. term, and remained in sustody after the end of History following, and then became supersedable for want of a declaration; but not applying for a supersedable for want of a declaration; but not applying for a supersedable for want of a declaration; but not applying for a supersedable for want of a declaration; but not applying for a supersedable for want of a declaration; but not applying for a supersedable for want of the discontinuance, charged defendant in the custody of the Sheriff with a new writ for the old cause. Rule absolute for a supersedaes on entering a common appearance. Barnes, 396.

If a prisoner on mesne process escape, and is retaken on an escape warrant, and in custody of the Sheriff, &c. the plaintiff must declare against him within two terms after taken on escape warrant. Reg. 6 Anne, B. R. and the same practice

in C. B. 1. Barnes, 285.

If a prisoner escapes, his recaption shall be looked on as the time of the render from whence the plaintiff is to pro-

ceed. Barnes, 382.

If a defendant is in the custody of the Sheriff, and the plaintiff has declared against him as in such custody, he may, not-withstanding, if he thinks proper, remove the desendant into the custody of the Marshal by habeas corpus ad faciendum is recipiendum: for the act. 4 & 5 W. & M. was only made for the ease and benefit of plaintiffs, to save them the trouble and expence of suing out an habeas corpus to bring the desendant into court, and does not take away the plaintiff's common law right to remove him. Dr. Bettesworth & Bell, Esq. Burr. Rep. 4. pt. 1875.

But note, fuch habeas corpus must be tested in term, though

it may be returnable immediate.

If the prisoner was arrested and in custody at the suit of the plaintist, there is no need of an affidavit on delivering the declaration [as there must be when he is already in custody at the suit of another] because there was one on the writ. Rules & orders, K. B. & C. B. 2 Vol. 144. Prast. Reg. 230.

A declaration against a prisoner in custody, must shew at whose suit he is in custody. L. Raym. 1362. S. P. 1 Will. 120.

In C. P. on a motion to stay proceedings upon a declaration delivered against a prisoner in a county gaol, because the declaration had not been entered in the Prothenotary's office before delivered, the court said that it was sufficient to enter the declaration any time before giving a rule to plead. Barnes, 372.

Of proceeding against Prisoners in Custody of the Sheriff, &c. under a prior Commitment.

WHERE one has cause of action against a prisoner already in the custody of the sheriff, &c. he may, instead of removing the prisoner into the court above, charge him with such action in the custody of the sheriff, &c. But if he would remove him, he must take out an Habeas Corpus ad respondendum.

If the cause of action is not bailable, or under rol. the prisoner must be served with a copy of the process, as in other cases; and if he neglects to file common bail, or enter a common appearance, the plaintist, on affidavit of service, may do so for him, and proceed in such cases according to

the statute, as against any other defendant.

But if the cause of action is above 101. and plaintiff would proceed so as to hold him to bail, then plaintiff, if in B. R. must make an affidavit thereof, and file the same with the clerk of the rules.—If in C. B. he must sue out a special capias, on which a warrant must be lodged with the gasler, in order to

detain him in custody.

In B. R. plaintiff, in order to charge a prisoner in custody of the Sheriff, &c. makes three copies of a declaration,—one on triple penny stampt parchment, called the bill, which must be filed with the clerk of the declarations—another on triple penny stampt paper, to deliver to the prisoner himself, or leave with the gaoler or turnkey—the third, like the last, to be filed with the clerk of the rules; to which must be annexed an affidavit of the delivery of the one to the prisoner or turnkey, of which declaration and affidavit he will make an office copy on stamps, or the plaintiff's attorney may do it himself: but if he does, he must take it to the clerk of the rules to be marked, when he files the original declaration and affidavit, and pay for the same according to the length.

In C.B. the plaintiff must file his declaration with the prothonotary, and serve a copy thereof on the prisoner, or leave

the same with the gasler or turnkey.

In B.R. the affidavit of the delivery of the declaration, must be filed with the clerk of the rules before the end of twenty days, after the end of the fecond term after the return of the process.

In C.B. there must be a like affidavit of the delivery, filed with the prothonotary within the like time: but if Easter

Mar fort, no fach afidagit is necessary.

Of proceeding against Prisoners in Custody of the Sheriff, &c. under a prior Commitment.

term is the second term, such affidavit must be filed within ten

days after, &c. \*

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The Plaintiff in this case must declare within two terms, and the clerk of the rules if in B. R. or prothonotary if in C. B. will enter a rule for desendant to appear and plead on the office copy of the declaration; after which, if he fail to plead in due time, a demand of a plea being made, judgment may be signed: and if he does appear and plead, then the proceedings are the same as in other cases.

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Note, A like affidavit is requifite, though defendant removes himself from one gool to another; but if he is in custody of the Marshal, no such affidavit is necessary.

Of proceeding against Prisoners in the custody of the MARSHAL and of the WARDEN OF THE FLEET.

F any defendant shall be committed to the custody of the Marshal, or arrested or committed by virtue of any process of this court, to the cultody of any Sheriff, or other officer whatfoever, at the fuit of the plaintiff, and shall so remain in custody by two terms, and the plaintiff shall not declare against such defendant within that time, fuch defendant, after the end of the second term after such imprisonment, shall be discharged out of the prison where he shall be so detained, upon filing common bail, figned by one of the justices of this court, without any notice to be given to the plaintiff or his attorney. Reg. 2 Geo. 1.

Within the above rule in B. R. it is held, that the term in which the writ [whereby defendant was arrefted] is returnable is to be accounted as one of the two terms, although fuch writ be returnable the last day.—And in the case of a commitment, the term wherein defendant was committed to the Marshal is one, though the commitment be on the last day of a vacation.

If any defendant shall render himself, or be rendered, to the Fleet prison, in dis-charge of his bail, at the suit of any plaintiff, where no declaration has been delivered, unless the plaintiff shall declare against such defendant within two terms after such render, such defendant may be discharged out of custody by supersedeas, to be allowed by one of the justices of this court, if cause be not shewn to the contrary by the plaintiff or his attorney, upon notice to either of them given by the defendant's attorney or agent, and affidavit made of fuch notice. Reg. 8 Geo. I. afidowith the the plantite

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If a prisoner was arrested, and in custody at the suit of the plaintist, there is no need of an affidavit on delivery of the declaration, because in such case there must have been one on the writ; whereas if the declaration be as a new charge, there must be a new assidavit. Rules and orders, L.B. & C.B. 2 vol. 144.

Of proceeding against Prisoners in the custody of the MARSHAL and of the WARDEN OF THE FLEET.

If a person has cause of action against a defendant, prisoner in the cultody of the Marshal or Warden of the Fleet, he may charge fuch defendant in custody by delivering a declaration, observing the following rules.

when In B. Regarden

For preventing the detainer of prisoners, charged by de- of prisoners, charged by decharations, in the custody of clarations, delivered at the the Marshal of the Marshalfea Fleet prison, where the cause of this court, where the cause of action against such prisonof action against such prisoners ers does not amount to 101. does not amount to roll and -It is ordered, that no copy declaration, before the leaving thereof with the turnkey. Eaft. 15 Grs. 2.

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In C. B.

For preventing the detainer upwards-It is ordered, that of a declaration delivered at from and after the last day of the Fleet prison, against any this term, no declaration, prisoner there, shall be suffi-whereby any prisoner shall be cient charge to hold such pricharged in the custody of the foner to bail, or to retain Marthal, shall be sufficient such prisoner in custody for cause of detaining such pri- want of bail, unless an affifoner in cultody, unless an davit, that the plaintiff's affidavit, that the plaintiff's cause of action amounts to cause of action against such 10l. or upwards, be first made prisoner does amount to rol. and filed in the prothonotary's or upwards, shall be first made office, and an indorfement and filed with the clerk of the made by the faid prothonotary, rules of this court, and the fum or his deputy, upon fuch copy specified in such affidurit shall of a declaration, signifying the be industed by him upon such sum of money specified in such affidavit; for which fum fo indorfed, bail shall be required, and no more. Hil. 8 Geo. 2.

In explanation of the above rule, it has been adjudged, that if a defendant, arrefted by process issuing out of the court of King's Bench, and incustody for want of bail, remove himself by babeas corpus to the Fleet prison, and the plaintiff charges him in the

Of proceeding against Prisoners in the Custody of the MARSHAL and of the WARDEN OF THE FLEET.

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Hence it appears, that where a defendant is in the custody of the Marshal, under a former commitment, you may deliver a declaration, and not serve him with process, whether the cause of action requires bail or not; but if the action requires bail, there must be an offidavit filed with the clerk of the rules; else it is no cause of detainer, if he should be superseded in other actions against him; but then, as in all cases where the cause of action does not require bail, common bail must be filed in those actions, on being superfeded in such actions as require bail.

Process may be served on

In C. 25.

Fleet with a copy of a declaration, he is not obliged to make and annex an affidavit, as by the above rule is directed, in regard there was an affidavit made of the debt of present coursel treet, of the state of th when the plaintiff took out the process upon which the defendant was arrested; but a say has fact thriggs noting to if a declaration comes in as a new charge against a prisoner in cuftody at the fuit of another plaintiff, there the above rule must be observed. Rep. & cas. of pract. C.B. 144. Barnes, 72. Pract. reg. C. P.

If any person hath cause of action against a prisoner committed to the Fleet, he may deliver a copy to the defendant or turnkey, and after rule given to plead, to be out in eight days after delivery of the declaration, and affidavit being made of the delivery, the plaintiff may fign judgment as if the defendant had been charged at the bar of the Common Pleas, [or Exchequer] with fuch action. 8 & 9 W. 3.

c. 27.

A prisoner surrendering as a man in custody of the a fugitive, cannot be charged Marshal, having surrendered with a declaration under this

Of proceeding against Prisoners in the Custody of the MARSHAL and of the WARDEN OF THE FLEET.

himself to take the benefit of the act for relief of insolvent debters. Pry v. Lawford, 3 Geo. 2.

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To charge a prisoner in custody of the Marshal, in vacation time, [instead of the old method of suing out an babeas corpus ad responditested as of the last term] the plaintist must file a bill of the preceding term, and then deliver or leave for the defendant in custody, a copy of the declaration as of the preceding term, and make an affidavit of the delivery thereof. Burr. 47, 1052.

And so in term time, and the desendant is a prisoner in custody of the Marshal, you ingross and file a bill, and deliver a copy of the declaration thereon to the prisoner himfelf, or leave the same with the turnkey, and give a rule to plead, demand a plea, and proceed as in other cases.

In this court a bill must always be filed against a prisoner; and for want of it, he is intitled to a supersedens, although he has pleaded.

act, because not committed. Prac. Reg. 126. I Barnes 281; but it seems he may be arrested. Ibid.—and vide 2 Blacks. Rep. 970. That a fugitive surrendering himself to the Fleet, under the insolvent act, is not a prisoner in the custody of the Warden, nor liable to be charged with a declaration.

To charge a prisoner in the custody of the Warden of the Fleet, in vacation time; the plaintiff draws his declaration as of the preceding term, gets it stamped by the prothonotary, and delivers or leaves it with the clerk of the papers.

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To charge a prisoner in term time, the plaintiff draws his declaration, gets it stamped by the prothonotary, and delivers or leaves it with the clerk of the papers of the Fleet.

When the defendant is a prisoner in the Fleet, the declaration must be entered with the prothonotary, before the delivery of the declaration to the defendant; but if

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Of proceeding against Prisoners in the Custody of the Marshat and of the Warden of THE FLEET.

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the defendant is in any other prison, it need not be so en-So your surrous to sud or 80. tered before the delivery, but it is fufficient to file it any time before a rule is given the state of the state of the state of thereon to appear and plead.

And note, That when the defendant is in the Fleet, the original declaration, indorfed by the prothonotary, should be left at the Fleet, and not a copy thereof. Whereas, when the defendant is in another gaol, the original declaration is filed with the prothonotary, and a copy thereof delivered to the defendant. Pract. Reg. 331. 1 Barnes, 315.

A prisoner once supersedeable, is also so with respect to the plaintiff himself in that cause; but not as to third persons; for by them, so long as he is in actual custody, he may be charged as a prisoner. Burr. Rep. 4 pt. 1048.

After an irregular declaration against a prisoner, the plaintiff cannot declare de novo, unless the prisoner is in custody

at another person's fuit. Pract. Reg. 328.

Where a declaration is irregularly delivered, the prisoner must complain thereof before judgment. Pract. Reg. 329.

Defendant obtained a fupersedeas for want of prosecution; but having, whilst in custody, drawn a bill of exchange in plaintiff's favour, for part of plaintiff's original debt, which draft was refused to be accepted, plaintiff, as defendant was going out of prison, caused him to be arrested, and held to bail, as the drawer of the faid bill. Defendant fwore, that by agreement between him and plaintiff, the draft, if not accepted, was to be delivered back to defendant. The court thought that by this draft, which if accepted and paid, would have pro tanto discharged part of the original demand, no new debt was created, ordered a supersedeas to the new action, on entering a common appearance. Barnes, 397.

Of proceeding against Prisoners in the Custody of the MARSHAL and of the WARDEN OF THE FLEET.

Note, A declaration must be served on a prisoner, or left with the turnkey, though he has appeared by attorney.

Blacks. Rep. 786.

And note, If a defendant is served with process, or arrested when at large, and becomes a prisoner in the Fleet before declaration, the declaration must be delivered to the turnkey. ther in B. R. unien be brings

of the Alex of the the thirty the defendant back there by me by the mile abidiates a habens corpused offerd aftern. And if a prifoner in the But if a prip a the the cultury of the first to a chamind with a declarabeing charged with a recit. Honella C. H. semove him: well to use his the plaintiff happy the plaintiff and pro-mall proceed a marriage in second to indement in C. A. h. W. and the state and the corry him back by Louising back by Larrie to the water was the continued of the continued to the charge him in the Safetie de la tope chaire. to Commission some walling ALCENT THE THE PROPERTY OF many the That if your Aunt Involues o'srus See 188 intelligent of the party of the manufacture of the party H. w.E. R. before the skind R. R. to C. R. Lefore planred has declared, the planted, eld his declared, the plaintiff those not deal to within the deep not declare, within the two terms of atendant's reservine defendents upmust be made to C. B. A grell be to B. R. But if he removes, after But if he growies after Mong changed with a decinration, [and not brought back neconfert as each hebaca by before coper, total for by talent coroned then, for went of being charted in want of not hear; eforged to execution in due time, Se execution in due time, Mc.

2 3 11 Luc A E lo mo ent of il con a la lo sirw out of the other out of C. E. where the perion is in gaol, the west which is first fered figil have the body;; and the prifoner may agreements, by anody a wine, remove himself into the color court, but then the mist plead hift. 1

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Of proceeding against Prisoners removing themselves when charged with Process.

In 18. 1R.

If a prisoner in the Marfballea, on mesne process, removes himself to the Fleet, before the plaintiff has declared against him, the plaintiff then must declare in C. B. and cannot proceed surther in B. R. unless he brings the desendant back there by babeas corpus ad respondendum.

But if a prisoner in the custody of the Marshal, after being charged with a declaration in B. R. removes himself to the Fleet, the plaintiff must proceed to judgment in B. R. and then bring the defendant back by habeas corpus adsatisfaciendum, to be charged in execution in B. R.

And note,—That if upon the defendant's removal from B. R. to C. B. before plaintiff has declared, the plaintiff does not declare within the two terms, the defendant's application for a fuperfedeas must be made to C. B.

But if he removes after being charged with a declaration, [and not brought back by habeas corpus] then, for want of not being charged in execution in due time, &c. he must apply for a supersedeas to B. R. In C. 18.

removes himself to the Marshalfea, before the plaintiff has declared, the plaintiff must declare in B. R. and cannot proceed further in C. B. unless he brings the defendant back by babeas corpus ad respondendum.

And if a prisoner in the Fleet, charged with a declaration in C. B. removes himfelf afterwards to the Marshalfea, the plaintiff must proceed to judgment in C. B. and then carry him back by habeas corpus ad satisfaciendum, to charge him in the Fleet.

And note,—That if upon defendant's removal from C. B. to B. R. before the plaintiff has declared, the plaintiff does not declare within the two terms, the defendant's application for a supersedeas must be to B. R.

But if he removes, after being charged with a declaration, [and not brought back by habeas corpus] then, for want of being charged in execution in due time, &c. he must apply for a supersedeas in C. B. Barnes, 384, 385.

If two writs of babeas corpus issue, the one out of B. R. and the other out of C. B. where the person is in gaol, the writ which is first served shall have the body; and the prisoner may afterwards, by another writ, remove himself into the other court; but then he must plead first.

Apri-

Of proceeding against Prisoners removing themselves when charged with Process.

A prisoner surrendered by bail, was superfeded, because charged in the same court after he had removed himself

Stra. 1153.

Motion for a supersedeas, for want of a declaration in C. B. within two terms .- Defendant committed to the Fleet, (charged inter al' with a bill of Middlefex at the plaintiff's fuit) before declaration delivered; and afterwards the plaintiff delivered a declaration in the King's Bench, at the Fleet, and not a declaration in C. B. which declaration being delivered after the defendant had removed to the Fleet, as a declaration of the King's Bench, the Court held as null and void, and

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made the rule absolute. Barnes, 402.

Plaintiff having made affidavit of his debt in B. R. arrested defendant by latitat, indorfed for bail. Defendant removed himself to the Fleet by habeas corpus, charged with this latitat; and plaintiff declared against him there without making a fecond ashdavit; on which defendant moved to be discharged on a common appearance, infifting, that in order to hold him to bail regularly, plaintiff ought to have made an affidavit of his debt in this court, and procured it to be indorfed on the declaration, according to the rule 8 Geo. 2. A rule was made to shew cause, which was discharged, the court being of opinion, that the rule of court extends only to cases, where a declaration is the first proceeding, and not to this case. Sampfon v. Warren. Barnes, 75.

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## 30 Of the Rule to appear and plead, &c. 10

In B. R. begrand

If the defendant is in cultody of the Sheriff, a rule to appear and plead must not be given before affidavit is filed of the delivery of the declaration, which affidavit must be filed within twenty days with the clerk of the rules, after the end of the second term Reg. 5 W. & M.

But if the defendant is in the custody of the Marshal, no affidavit of delivery is neceffary, but a rule to plead may be given of courfe, And if the declaration is delivered four days exclusive before the end of term, and rule given, and plea demanded which must be done on the back of the declaration] the defendant must plead as of that term:-But if the bill is not filed, and copy delivered four days exclusive before the end of the term, the defendant may imparl till the next.

In C. 18

The same practice in the Common Pleas, the affidavit being to be filed with the prothonotary. But if Eafter term is the second term, then the affidavit of delivery mutt be filed within ten days.

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So if defendant is a prisoner with the Warden, no affidavit of delivery is necessary—and in fuch case the rule to plead is out in eight days, inclusive.

If defendant is in a common gael, and the declaration is delivered before the effoign day of the term, the rule is out in four days,

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If a declaration is delivered to a prisoner the last day but one of term, he must plead two days before the essoign day of next term. Barnes, 244.

If process is returnable the first day of Easter or Michaelmas term, and the declaration be delivered before mensem paschæ, or the morrow of all fouls, and affidavit thereof filed, the defendant must appear before ten days after Eafter or Michaelmas term; and if he appears within that

In Easter and Michaelmas terms, if the declaration is delivered before mensem pascha, or morrow of All Souls, the rules to plead are out in ten days after the term, except the action is in London or Middlefex, and the defendant a prifoner within forty miles, as in B. R.

time,

# Of the Rule to appear and plead, &cc.

In 13. R. time, he may imparl till the next term, unless the action is

in London or Middlefex, and defendant is in prison within forty miles of London : and then. though he appears within that time, he must plead two days before the effoign day of that organization and the fubsequent term. Reg. Eaft.

5 W. & M.

If the declaration be delivered on or after menf. pasch. or morrow of All Souls, or in Hilary or Trinity, and rules given, if defendant appears before the effoign day of the next term, he shall imparl till the next term; but if he does not appear within that time, the plaintiff is entitled to judgment.

In C. 13.

If the declaration be delivered after those days, the rules are out in two days next preceding the effoign day of the subsequent term.

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the plaintiff, at his arthrey, And in Hilary and Trinity terms, if the declaration is delivered on or after the effoign day of the term, the rules to plead are out two days before the effoign day of the subsequent term. But if defendant appears within the time, he may imparl as in B. R. East. 5 W. & M. and Vide 1 Barnes, 150.

If the declaration is delivered before the essoign day of the term next after the return of the writ, the plaintiff in such next term may give rules, and the defendant must appear and plead on or before the expiration of the rules. East. 5 W. & M.

Note, If a prisoner appears in person, he is bound to pay for the iffue book upon delivery thereof; otherwise if he appears by attorney. 2 Will. 11.

Notice of trial to a turnkey is good, in the case of a prisoner

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defendant. Stra. 248.

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# Of Judgment against Prisoners, and of charging them in Execution.

In 18. 1R. F the plaintiff does not proceed to trial or judgment within three terms after declaration delivered, such defendant shall be discharged out of custody, on filing common bail, notice being first given to the plaintiff, or his attorney, and an affidavit thereof made if the plaintiff or his attorney does not attend and shew cause against the discharge. Tr. 2 Geo. I. Note, The term in which the declaration is delivered is one.

Like discharge for want of getting a demurrer argued within the third term.

In C. 28.

The like practice in the Common Pleas as in the King's Bench, by Reg. Eafl. 8 Geo. 1.

So if plaintiff does not proceed within three terms after the render, the defendant having appeared.

Or within three terms after recaption, or comingagain into prison; for that time shall be looked on as the time of the render. Barnes, 382.

So for want of getting a demurrer argued within the third term. Barnes, 383.

The defendant, though not in custody, upon being taken, but surrendered himself in discharge of his bail, is supersedeable within the above-mentioned rule, and its construction, and the practice of the court: and the time runs from notice of the

defendant's being in cuftody.

The defendant was discharged out of custody by supersedents, on entering a common appearance, for want of plaintiff's proceeding to judgment within three terms after declaration delivered. Plaintiff afterwards obtained judgment, and defendant being taken in execution, moved to be discharged, insisting, that after a supersedent his person was free, and could not be again detained by process in the same action. Per Cur. After consulting all the Judges in this case, the defendant having been discharged by supersedents before judgment, he is not finally discharged, but after judgment is subject to be taken in execution. But where a defendant is supersedent after judgment, for want of being charged in execution within two terms after judgment obtained, his person cannot afterwards be taken in execution. Barnes, 376.

After judgment obtained against a prisoner, he must be charged in execution within two terms, and the term wherein judgment

#### Of Judgment against Prisoners, and of charging them in Execution.

judgment is obtained is reckoned as one; or on default, defendant may obtain his discharge in like manner as for not proceeding to trial or judgment. Reg. Tr. 2 Geo. 1. B. R.

Eaft. 8 Geo. 1. C. B.

On shewing cause why defendant should not be discharged by supersedeas, the plaintiff having neglected to charge him in custody within the two terms, it appeared that plaintiff's attorney had taken out a ca. fa. but directed it to the Sheriff of Exeter instead of Devon; which being fent back he got it resealed, and fent it in time to an attorney, with directions to charge defendant in execution: but it arrived too late to charge defendant in time; and it appearing that there was no intention to oppress, and the delay arising entirely from an accident, the court discharged the rule. Barnes, 380.

The plaintiff shall have every day in the second term to

charge a prisoner. 2 Will. 380.

The writ of enquiry being fet aside, because not executed before a person properly deputed by the Sheriff, defendant applied for a supersedeas for want of plaintiff's proceeding to final judgment within three terms after the declaration, and obtained a rule to shew cause, which was made absolute.

Barnes, 384.

The defendant, a prisoner, applied to be discharged by Supersedeas, for want of being charged in execution within two terms after judgment. The plaintiff excused himself by the delivery of a ca. fa. to the gaoler within due time. But the court held that to be infufficient. The ca. fa. ought to have been delivered to the Sheriff, and the Sheriff's warrant to the gaoler, Barnes, 389.

Within two terms after final judgment, plaintiff, instead of charging defendant in execution, charged him with a declaration in an action of debt on the judgment. The court held this declaration vexatious, and no cause against a supersedeas, and made the rule for a supersedeas absolute. Barnes.

On motion for a supersedens for want of proceeding to judgment within three terms after declaration delivered, and cause shewn, it was contended, that the judgment, though not figned till Michaelmas vacation (Michaelmas being the third term) was a judgment of Michaelmas term, which was sufficient to prevent a supersedeas, Per Cur. The three terms are always taken to be inclusive of that term whereof the deOf Judgment against Prisoners, and of charging them in Execution.

claration is; and unless plaintiff proceeds to sign final judgment within the third term, he is too late. Rule absolute for

a fapersedeas. Barnes, 379.

The defendant was brought into court by baheas corpus an fatisfaciendum, to be charged in execution; which being objected to, because a judge had before made an order for a fupersedeas, which was lodged with the Warden, and allowed, and appearance entered: but as defendant had not served the order, nor allowed the supersedeas till after the baheas corpus was lodged with the Warden, the court held that he must be charged, and that he might apply afterwards as advised. The

plaintiff may proceed at his peril. Barnes, 379.

The defendant in Michaelmas term was surrendered in discharge of his bail; and afterwards, without giving any notice to the plaintiff, was removed to the Fleet. The plaintiff in Hilary, charged him in execution as a prisoner in B. R. and afterwards, defendant moved for a supersedeas, upon the ground that the charge in the court where he was not a prisoner, signified nothing, and so two terms were elapsed. The plaintiff insisted he was in no default, not having notice of the removal; and that these removals do not appear on the committitur book, where the charge in execution is to be made. But the court granted a supersedeas; for the plaintiff, they said, should have demanded to see the prisoner: and if not produced, would have known where to find him, and bring him back by habeas corpus, to charge him. Tilkes v. Allen, Stra. 1153.

A prisoner who is supersedeable in one action at the suit of A. but not superseded, may be charged in execution in another action at the suit of A. Barnes ad finem, 500. Prad.

Reg. 382.

If defendant, a prisoner, brings a writ of error, plaintiff has no need to charge him in execution the second term after

the judgment. 2 Wilf. 380.

Plaintiffs obtained interlocutory judgment by nil dicit in an action of assumpsit, and sued out a writ of enquiry; but before the same was executed, became bankrupts, and proceeded to final judgment against desendant, a prisoner [which was regular] in Michaelmas term. The assignees then brought a scire facias against him, returnable the first return of Hilary, to shew cause why they should not have execution of that judgment; to which sci. fa. the desendant pleaded the whole matter stated, and the bankruptcy of the plaintiff's in bar.

#### Of Judgment against Prisoners, and of charging them in Execution.

To which the affignees demurred and had judgment in Eafter The defendant then moved that he might be discharged by supersedeas, the plaintiff not having charged him in execution in Hilary. But Per Cur. The bankrupts could not charge defendant in execution, in last Hilary term, because the assignees were entitled to the benefit of the judgment, and had then brought a sci. fa. upon it. And if defendant had any land [which he may have for any thing we know] the alfignees may perhaps choose an elegit against the lands, and not charge the person. Whereupon the rule to shew cause was discharged, the affignees having proceeded with due dili-gence. 2 Wilf. 378.

If a prisoner surrender after judgment in discharge of his bail, he must be charged in execution in two terms after render, except a writ of error is brought, or there is an injunction. Note on Reg. Tr. 2 Geo. 1. B. R. Pract. Reg. C. B. 377. But quære as to injunction, and vide Salk. 322. Where, by injunction out of Chancery, the defendant stayed the plaintiff's execution a year and upwards. The injunction being dissolved, the plaintiff took out execution without a sci. fa. and this was referred to the court for irregularity. plaintiff infifted that he was stopped by the act of the defendant; and that, if the defendant had suspended it by a writ of error fo long, he had been at liberty to take out execution without a sci. fa. Sed per cur, We cannot take notice of Chancery injunctions; and you might have taken out a writ of execution, and continued it by vicecomes non mist breve. A Supersedeas quia improvide was awarded. Booth v. Booth.

Where a prisoner is discharged for want of proceeding to judgment, he may afterwards be taken in execution; but otherwise, if discharged for want of being charged in ex-

ecution. Pract: Reg. 333. 2 Vol. Rules and orders, 135, 6.
A prisoner discharged upon an insolvent act, and afterwards arrested for a debt exceeding the sum limited in the act, shall not be discharged on common bail. Ld. Raym. 1088.

If the defendant is discharged by the Lord's all, he cannot be retaken on execution or new action. 1 Barnes, 271.

A prisoner on a capias utlagatum, discharged on an infolvent debtor's act, cannot be taken again on a new capias utlagatum. 1 Barnes, 278.

An action on the case lies against an attorney, for neglecting to charge a prisoner in execution in due time.

Of Judgment against Prisoners, and of charging them in Execution.

Vide the cafe of Ruffell v. Palmer, an Att. C. B. 2 Wilf. 325.

And the case of Pitt v. Yalden. Burr. 4 pt. 2000. I want of plaintiff's declaring within the two terms. in Ibid. 10

Defendant being a prisoner in the Fleet, at the plaintiff's fuit, brought a writ of error, and thereupon judgment was reverled, and jupersedeas issued, to discharge her out of custody; but before the could get the supersedens allowed, the plaintiff charged her with a new declaration; whereupon the moved to be discharged, and the court held, that as defendant was detained a prisoner at the plaintiff's fuit only, and not at any other person's, she could not regularly be charged with the second declaration after reversal of the first judgment, whereon she had been wrongfully detained; and therefore ordered defendant to be discharged. Peachy v.

Bowes, Spinster. Barnes, 368.

But where afterwards the plaintiff caused her to be arrested and held to bail for the former cause of action, and she moved to be discharged on a common appearance, two judges held, that as the second declaration was no charge, the had the benefit of her supersedeas; and that after the judgment was reverfed and annulled, the plaintiff had a right to bring a new action, and hold her to bail. But the other two judges were of opinion, that after the defendant had been discharged by rule of court, as to the second declaration, the ought now to be discharged on entering a common appearance; and that the rule of court amounts to the fame thing as a supersedeas. The court being divided, no rule was made. Sherwin v. Bowes, spinster. Barnes, 499. Though in the book the names of the plaintiffs are different, it appears clearly from the report to have been the same parties

Defendant in the Fleet, being supersedeable for want of plaintiff's proceeding to judgment within three terms after declaration delivered, summoned plaintiff before a judge: whereupon plaintiff [having obtained judgment after the three terms were expired] immediately brought a habeas corpus ad fat. and charged defendant in execution. Defendant then applied to the court, and obtained a rule to shew cause why he should not be fuperfeded, for want of plaintiff's proceeding to judgment within time. Which rule afterwards was made absolute; the court being of opinion, that defendant had been wrongfully detained in custody from the time he became

fuper-

# Of Judgment against Prisoners, and of charging them in Execution.

supersedeable, and that plaintiff ought not to graft a good

charge on a wrongful imprisonment. Barnes, 398.

Defendant, a prisoner in the Fleet, after judgment brings a writ of error, put in bail thereon, and applied to be discharged by supersedeas. Plaintiff's counsel objected, that if the writ of error should be nonprossed, for want of transcribing the record, the bail would not be liable. But the court held, that though the record should not be transcribed, yet the bail being bound to prosecute the writ of error with effect, will be liable; and made the rule for a supersedeas absolute. Barnes, 499.

If after judgment the defendant is fuperfeded for want of being charged in execution, if debt be brought on that judgment, and judgment recovered thereon, the defendant may be taken in execution on flich second judgment. Ismay v.

Dewin. H. 15 Geo. 3. C. B. 2 Blackf. rep. 982.

ech or haln B. R.

If the defendant, a prisoner, is in the King's Bench prison, in order to charge him in execution, the plaintiff must get a rule from the clerk of the rules, and serve the Marshal with a copy, on which he will write his acknowledgment of the defendant's being in his custody. Then he must enter a committitur in the Marshal's book, and sile it. Note on Reg. Tr. 2 Geo. 1.

Upon motion to fupersede the desendant, as not being charged in execution in two terms, the court held, that the committitur must be actually entered on record, before the end of the second term; and that there is no extension of the time to the continuance day after term. Nor is it sufficient that there be an entry in the Marshal's book in time. Stra. 1215.

In C. B.30 v offin

If the prisoner is in the Fleet, you make out an babeas corpus ad satisfaciendum, get it signed by the prothonotary and backed by a judge. After which, carry it to the clerk of the papers at the Fleet, four days before the return, and then the defendant must be brought into court to be committed in execution.

If a defendant be brought into court upon an habeas corpus ad fatisfaciendum, he can be charged in execution on the last judgment only, on which the habeas corpus issued.—If there be several judgments on which he is to be charged, there must be an habeas corpus on each,

#### Of Judgment against Prisoners, and of charging them in Execution.

A committitur in execution was entered in the Marsbal's book, but no committitur piece filed; nor was the committitur entered on record within two terms. Rule abfolute for discharging defendant on the authority of the above case; for the committitur ought to have been actually entered on record before the end of the second Totterell v. Philley: Burr. rep. 4pt. 1841.

If the defendant is in the custody of the Sheriff, a ca. fa. must be sued out, and a warrant thereon lodged with the gaoler, a fairful to soften

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If a defendant be brought

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A babeas corpus ad Satisfaciendum in one cause only; and three judgment rolls were produced in this, and two other causes by the attorney for the plaintiffs, who defired that defendant might be charged in execution in all three. But by the judges in the treasury, the defendant can only be charged in that cause wherein the babeas corpus is brought. There must be an habeas corpus on every judgment. Barnes, 223. The fame in C.B. but if

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the ca. fa. be delivered to the gaoler instead of the Sheriff, is well. 2 Barnes, 308.

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in his cuffody. then he mitted in execution: nel enter a companion in tow Alar bal's tool, and file the Nove on Rest. 1. 2 Con. 1.

Upon motion to hearlide the defendant as not being charged in execution in res tour, the court beld that

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surer or only with the median is to be discised, there paid be an have it corpus on each.

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#### Of a Prisoner's obtaining a Supesedeas.

TO discharge a prisoner in any case, whether for want of declaring, neglecting to proceed to judgment, or not charging him in execution, his attorney must take out a judge's summons, to shew cause why defendant should not be discharged, for want of charging him (or whatever the case is) in due time, and serve the same on the opposite party; and if the plaintist's attorney do not attend thereon, or consent to an order being made, the desendant's attorney must make an affidavit of the service of the summons, and his attendance at the time therein appointed; whereupon the judge will make an order for the desendant's discharge, on filing common bail.

If the prisoner is in the custody of the marshal of the King's Bench, he must get a certificate from the clerk of the common bails, that common bail was filed with him, by order of one of the judges; on producing which certificate to the marshal, he will discharge him without a supersedeas.

But if the prisoner is in the custody of a sheriff, &c. he must sue out a writ of supersedeas; for signing of which at the office, the bail-piece, signed by one of the judges, is a warrant to the officer with whom you leave it, and he delivers it over to the clerk of the common bails to be filed.

But in the Common Pleas in all cases, whether the defendant is in the Fleet, or in custody of the sheriff, a supersedent issues, to be allowed by a judge to discharge him out of custody. Reg. E. 8 G. 1.

A cake the rewarding to produce his liberty, gets a perfon to whom he was received to see our an hateur corpus ad informally should make to be tagned over to the Marphallar court to the Marphallar had be received brought into court it was moved, that he receives be remainded to the Marphallar Sed performance of freedom or free would have courted the defend a charge of treation or free would have courted the defendance of the the hand been fired against him, to but he had been the cultivation of the marting before him, to but he had been the heart fired against him, to but he had been the heart fired against

But in order to discharge a prisoner, for want of declaring according to the rule, 2 Geo. 1. you must also obtain a certificate from the clerk of the declarations, if in B. R. that no bill is siled in his office against the defendant; and a certificate of the causes, wherewith he stands charged, from the clerk of the papers of the King's Bench prison, if in custody of the marshal; and from the gaster or turnley, if in custody of sheriff or other officer.

Of

Of Prisoners removing themselves by Ha-BEAS CORPUS from the Prisons of inferior Courts into the King's Bench or Fleet Prisons.

A Prisoner in the prison of an inferior court, will often sue out an babeas corpus cum eausa, in order to turn himself

over to the King's Bench of Fleet Prifon.

But if it be returned upon any certiorari, or corpus cum causa, that the prisoner is condemned by judgment, he shall be remanded, and remain in prison, without being let to bail against the will of the plaintiffs, unless satisfaction be made them of the sums adjudged. 2 Hen. 5. stat. 1. 6. 2.

A defendant brought into court by habeas corpus, directed to the sheriff of G. prayed to be committed to the Fleet, with the causes mentioned in the return; which were first, a detainer for want of sureties, by a warrant from a justice of the peace, for leaving a bastard child, whereby a parish became chargeable with its maintenance.—2dly, An excommunicate capiends issued out of Chancery, returnable in the King's Bench. And 3dly, With Exchequer process on a recognizance sorfeited at the sessions.—The court remanded the prisoner, being of opinion, that as to the two first causes of detainer, they had no jurisdiction; but as to the third cause, the court inclined to think, that as it was not on an extent, the defendant might have been committed therewith abstractly considered. Barnes 223.

A defendant was taken in execution in the admiralty court, and wanting to procure his liberty, gets a person to whom he was indebted to sue out an babeas corpus ad respondendum, in order to be turned over to the Marshalsea: And being thereby brought into court, it was moved, that he might be committed to the Marshalsea. Sed per cur. Tho' upon an babeas corpus ad subjiciendum, this court, upon a charge of treason or felony, would have turned the defendant over to the marshal; or if a bill had been filed against him, so that he had been in the custody of the marshal before; but yet, in this case, the court cannot do it, because there is no plea in this court, at this time, depending against him: and it cannot be, because he is not in custodia mareschalli. And he was remanded by the whole court. Dowler v. Keite. Ld.

Raym. 789. Salk. 351. bra talabantes

So in Dr. Watfon's case, who being arrested upon an Excommunicate capiendo, after an excommunication in the Spiritual Court, for non-payment of costs, in a suit in which

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Of Prisoners removing themselves by Ha-BEAS CORPUS from the Prisons of inferior Courts into the King's Bench or Fleet Prisons.

he was condemned, was brought into B. R. by habeas carpus ad resp. J. S. de placito debiti, &c. And on motion to be committed, he was remanded, because no suit was depending here against him, the bill of Middlesex not being returnable till next term. Ibid.

If a prisoner in the Compter be removed into the King's Bench, upon an hab. corp. ad resp. and intending to go over into the Fleet, procures some friend to bring an habeas corpus to remove him; he shall not be removed thither, till he has answered to the cause here; and he shall not compel the plaintiff to sollow after a prolling defendant; and so vice versa of the Common Pleas. Each court shall retain the defendant in which he is first attached; and after he has answered there, you may carry him where you will. Salk. 250.

Actions having been entered in B. R. against one in custody of a sheriff, upon a ne exeat regno, an habeas corpus was said might be granted, although strongly objected to; because the writ of ne exeat regno commands the sheriff to take security, and transmit it into Chancery. Sed per cur. The habeas corpus ought to be granted: The King's Bench may receive and judge of the security taken; and he ought to remain there; and that they may then grant a supersedeas. Nailor's case. Ld. Raym. 696.

The defendant was brought to the bar by habeas corpus, returnable in one month from the day of St. Michael, to be committed to the Fleet; and the court committed, though the day of the return was past. Barnes 221.

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ch he From the above cases it appears, that where a prisoner is in custody charged with process from another court than that to the prison of which he would be turned over, he must (before ever he can be turned over) procure himself to be charged with some process issuing out of the court into the prison of which he would be turned over, and then bring his habeas corpus, that he may be returned charged with such process.

Where any person shall be brought into court upon an habeas corpus, or before a judge, in order to be committed to the custody of the marshal, the writ, with the return, shall be left with the secondary, or judge's clerk, to be filed; and a Yol. II.

Of Prisoners removing themselves by HAL BEAS CORPUS from the Prisons of inferior Courts into the KING'S BENCH OR FLEET PRISONS.

copy or note of fuch return of the writ, under the hand of the judge or fecondary, shall be delivered to the marshal at the time of the commitment of fuch person to his custody; and fuch copy or note shall be prepared by the person prosecuting fuch writ of babeas corpus, or by his attorney. Trin.

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OUTLAWRY is a punishment inflicted on a person for a contempt and contumacy, in resusing to be amenable to, and abide by the justice of that court which hath lawful authority to call him before them; and as this is a crime of the highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to divers forseitures and disabilities; for hereby he loseth liberam legem, is out of the king's protection, &c. Co. Lit. 128. Rol. Ab. 802. Dr. and Student, dial. 2. C. 3.

But as to the forfeitures for refusing to appear, herein the law distinguishes between outlawries in capital cases, and those of an inferior nature; for as to outlawries in treason and selony, the law interprets the party's absence a sufficient evidence of his guilt, \* and, without requiring surther proof or satisfaction, accounts him guilty of the sact, on which ensues corruption of blood, and forseiture of his whole estate,

real and personal.

But outlawry in leffer crimes, or in personal actions, does not occasion the party to be looked upon as guilty of the fact, nor does it occasion an entire forfeiture of his real estate, but yet is very fatal and penal in its consequences; for hereby he is restrained of his liberty if he can be found, forfeits his goods and chattels, and the profits of his lands, while the outlawry remains in force. Plow. 941. 9 H. 6. 20. b.

Having stated the difference between outlawry in criminal and civil cases, I shall proceed to shew in what civil actions process of outlawry lies, in what manner a defendant may be prosecuted to outlawry, and how such outlawry may be

avoided or reversed.

Process of outlawry lies in no case, but where a capias lies. So that when the proceedings are by bill, and not by original, as there can be no capias upon a bill, so there can be no process of outlawry. Leon. 329. 2 Rol. Ab. 76. Sid. 159, Keb. 577.

The process of outlawry, in civil actions, is considered, at this day, nothing more than a process to compel an appearance of the party against whom a suit is commenced; and

In lesser crimes slight is not a conviction of the fact, as appears by Flesa 42. "Quamvis quis pro contumacia, & sugar utlagetur, non propter box convictus est de facto principali."

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therefore any plaufible cause, however slight, will, in general, be sufficient to reverse it. But in order to make the process to outlawry, and practice therein intelligible, it will be necessary to take a view of the statutes which have altered

the process of the courts.

The statute 13 Car. 2. stat. 2. c. 2. being made to remedy some \* abuses which crept in upon authorising the arrest of the desendant's body by the bill of Middlesex, latitat, &c. in B. R. and the general writ of capias clausum fregit in G. B. provides, that no person who should happen to be arrested by sorce or colour of any writ or process is suing out of the King's Bench or Common Pleas, shall be sorced upon such arrest to give security in more than 401 unless the true cause of action be particularly expressed in such

writ or process.

This statute not having remedied all the mischiefs that prevailed, as the sheriff was still to take bail for the defendant's appearance in 401. even upon a general writ, without the clause of " ac etiam;" and upon writs wherein the clause of " ac etiam" was inserted, he was authorized to require ball upon the arrest to the amount of double the sum specified therein; which was still an engine of oppression in the hands of a malicious and troublesome plaintiff, as he could express any sum in the clause of " ac etiam," or lay his damages therein to any amount, and thereby keep the defendant in gaol for want of bail—the statute 12 Geo. I. c. 29. was made to give a further remedy for fuch abuses, and provides, " that no one shall be held to bail, upon the arrest by process from the superior courts, unless an affi-"davit is previously made, that the cause of action amounts " to 101. or upwards; and that where no fuch affidavit is er made, that the party shall only be served with a copy of " the process, in order that he may appear to the action; " and, in case of his non-appearance at the return, the " plaintiff has liberty to enter (on affidavit made of due " fervice of the process) an appearance for him, and pro-" ceed as if the party had actually appeared." Then came the statute 5 Geo. 2. c. 27. to remedy the inconveniencies from the process being in Latin, and required the same to be in the English tongue; and where the party is only to be ferved with a copy thereof, when no affidavit is made of the debt's amounting to rol. or upwards, enacts, "that an " English notice, in writing, shall be subscribed on the copy tenerally profecuted in the'-

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of the said process wherewith the party is to be served, to the intent to warn him to appear at the return thereof, to

" answer the action against him."

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These statutes have, in great measure, occasioned the practice of outlawing desendants to fall into disuse, as a plaintist may proceed with less expence, and more expedition, in his action, by not taking out process towards outlawry, than by proceeding with an intention to outlaw, should the desendant stand out to be outlawed, the process thereto being dilatory and expensive. But still a plaintist in some cases, and particularly if his action is against a desendant, who it is apprehended will be litigious, or is difficult to be arrested, and has property wherewith to satisfy the plaintist's demand, and all the charges and incidental expences of the outlawry, will find an advantage in this method of proceeding.

The aforementioned statute of Cha. 2. was of equal service to plaintiffs as to defendants; for a plaintiff who chose to proceed by original, could insert any cause of personal action in the clause of "ac etiam," in the capias; arrest the party immediately, and require bail to the amount of double the sum expressed therein: but still the defendant was supposed to be arrested for the trespass mentioned in the writ, [though, in fact, no such charge could be alledged against him;] and not for the debt or damages inserted in the "ac etiam" clause, the intent of that being nothing more than to shew the sherisf, to what amount he was to insist upon

bail if he arrested the party.

This statute of Cha. 2. gave a plaintiff who had an action of debt against a defendant, if he sued by original, an opportunity also of avoiding the Fine paid to the king upon fuing out his original writ, in debt, because he could insert the amount thereof in the ac etiam clause of a capias, and, if the defendant was arrested, require bail in proportion to his demand; which was a cheaper method of proceeding, evidently more expeditious, and equally answered the purpose of fuing out an original in debt; and going on regularly towards outlawing the defendant: unless he was a person likely to abfcond or avoid being taken, and had property which the plaintiff could come at to fatisfy his debt by proceeding to outlaw him. For which reason we do not often hear, at this day, of a pracipe quod reddat, in debt, or of a person being outlawed in an action of debt, as that action is generally profecuted in the King's Bench by bill or latitat, which pre-supposes a bill; and in the Common Pleas by a capias, with an ac etiam in it; and a defendant cannot be outlawed by process with ac etiams.

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Since

Since the statute also of 12 Geo. 1. c. 29. before mentioned, we do not often hear of a defendant being outlawed by a common capias quare clausum fregit; because, if the plaintiff's cause of action does not warrant him to arrest and hold the defendant to bail, he is generally served with a copy of the process, with a notice subscribed, to appear; and upon no appearance within \* eight days after the return of the process, the plaintiff is at liberty, upon an affidavit made of the process having been duly served on the defendant, to enter an appearance for him, and proceed as if he had regularly appeared to the action. This method therefore, in cases not warranting bail, if the defendant can be met with, being more easy and expeditious, and attended with little or no expence to the fuitor, compared with proceedings towards outlawry, affords one reason, why outlawry is not often heard of now upon common capias's quare claufum fregit. Another reason also is, that should a plaintist proceed with an intention to outlaw the defendant upon common capias's, and the defendant even not come in till after the exigi facios, he may, notwithstanding, reverse the authoury had against him, without being compelled to put in bail to the action. So that the plaintiff, instead of gaining any advantage, in proceeding to outlawry upon common copias's, and not purfuing the line chaulked out by the statute for his own expedition, is not only put to expense, but is himself the occasion of his own delay, and frequently in a worse situation towards recovering his demand than he otherwise might have been, if he had proceeded as the statute directs him.

For the above reasons, a plaintiff seldom proceeds with a view to outlaw the defendant, unless the cause of action is such as to warrant holding him to bail; which must be for actions founded on contract, unless by special order of a judge in cases of torts. And, as the action of debt is not often commenced at this day by a pracipe quod reddat, on account of the fine upon suing it out, the action of assumpsit is that in which plaintiffs usually proceed, with a view to

outlaw the defendant.

In the King's Bench, as a writ of error brought on a judgment by original there, must be returnable in parliament, and not in the Exchequer Chamber, as where the suit is commenced by bill, a plaintist having a just demand against a litigious and wealthy defendant, who is likely to put off the day of payment as long as he can, by bringing writs of error, has a prospect therefore of getting

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his debt much earlier, by fuing by original, than by bill in the King's Bench. And, in either court, if the plaintiff's demand amounts to a confiderable fum, or the defendant cannot be easily caught, or has property which the plaintiff can come at, he may, in the end, reap more advantage, perhaps, by taking out process towards outlowry, than by fuing out a common capias quare claufum fregit, or a capias with a clause of " ac etiam" in it.

As the action of affumpfit, where the demand is fufficient to hold to bail, is the action in which plaintiffs in either court usually proceed with an intention to outlaw the defendant, I shall shew the method of commencing and profecuting such action, and of outlawing a defendant therein, and of his reverling fuch outlawry; at the same time it must be remembered, that the practice and proceedings in another action requiring bail, towards outlawry, would be exactly the fame purpose and then be removed by the medical in the country of the state of the country of

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Michael the said a plaintiff having a just demand see as artigious and wealthy defendant, who is likely to put off the day of payment as long as he can, by ormens write of error, has a profpedt therefore of getting

\* Fide C Geo. 2, C. 271 ...

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THE plaintiff's attorney, or special pleader, when the cause of action is above 10 l. draws out a pracipe for 2 special original; which pracipe contains the whole count or declaration, and ought to be drawn up with great accuracy and precision, as on it all the subsequent proceedings are built. The desendant's name, his degree, profession, or mystery must be ascertained and set forth according to the statute of additions, together with the town or hamlet, place and county, in which he is or was conversant.

The pracipe, in an action on the case on assumpsit, is to

this effect it seems and the growing of a main out who

Middlesex. If A. B. shall give you security to prosecute his suit, then put by sureties and safe pledges C. D. late of Westminster, in the county of Middlesex, upholder, that he be before our lord the King, on the morrow of the Holy Trinity, wheresoever our said lord the king shall then be in England [or if in C. B. say, "before our justices at Westminster, on the morrow of the Holy Trinity"] to shew wherefore Whereas, [so set forth, verbatim, the whole count, or declaration] to the damage of the said A. B. of one hundred pounds, as he saith, &c.

Returnable, &c.

E. F. attorney, 1 May, 1780.

This pracipe must be carried to the cursitor of the proper county, who will thereupon make out the + original writ. But in B. R. the pracipe is usually carried directly to the flazer, who procures the original from the cursitor, and immediately makes out the capias, &c.

The curfitor is paid at the rate of 2s. 6d. the first count, and 6d. for every other count contained in the practipe, upon making out the original writ. The filazer, who makes out the capias, &c. from the original writ, is also paid after the

above rate, befides 4d. for filing the original.

If the pracipe is carried to the cursitor, before the effoign day of a term, he will make the original returnable on any

Very often no original veris is made out at all.

return of the precedent term. The original is returned of course thus:

Pledges for profecuting, { John Doe. Richard Roe.

It has been often questioned, whether an affidavit was neceffary to be made of the debt, when a plaintiff fues by fpecial original, previous to the issuing of the process. But it was determined in lord Hardwick's time, M. 10 Geo. 2. Fownes and Allen, that process of outlawry is not within the flat. 12 Geo. 1. c. 29. so there is no need of an affidavit, when the plaintiff fues by special original, especially as the 5 Geo. 2. c. 27. f. 5. enacts, "That no special writ, nor any process specially therein expressing the cause of ac-" tion, shall be fued forth or issued from any superior court, " where the cause of action shall not amount to 10% or " upwards." Since which statute, as no special writ can issue where the cause of action is not above 10% it seems, that, before the issuing of a special writ, no affidavit is neceffary; because a Sheriff, if he apprehends the party either upon the special capias, alias, or pluries, before he lets him go out of his custody, for his own fafety, should take bail; and he can eafily know to what amount to take bail, as the whole cause of action is spread and set forth in the writ. Vide the case of Cracraft v. Gledowe, Burr. 4 pt. 1482.

In C. B. it was held, that on process to outlawry, no affidavit for bail is required by statute, or the course of the court.

Barnes, 322.

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If the plaintiff means to proceed to outlawry, he has no need to wait till the capias is spent, then to take out an alias, and endeavour to arrest the desendant, and after that a pluries; but he may, for expedition, get them all of the filazer at once (if there is time since the cause of action accrued to allow of the proper teste and return to each writ,) and return them severally of course after this manner:

"The within named C. D. is not found in our bailiwick." The answer of

Thomas Wright, Efq;
And
Evan Pugh, Efq;

Sheriffs.

The original writ must have fifteen days, at least, between the teste and return. The capies also must have fifteen days between its teste and return; and should regularly bear teste on the return day of the original: the alias also must have the same number of days, and should bear teste the return day of the capias; and the pluries capias must have the same number of days, and should bear teste the return day of the alias; whereas, if a plaintiff fues by original, and does not mean to proceed to outlawry, the capias may bear teste before the original, and even before the cause of action accrued, fo long as it is actually taken out afterwards; for you cannot have over of the capias, fo as to take advantage of it. Barnes, 173. And so held in B. R. Baft. 18 Geo. 2.

Note-The proceedings are exactly the fame towards outlawry upon a common capias quare claufum fregit, as on a

special capias.

Upon the return of non est inventus to the pluries capias, process of outlawry begins, which is the writ of evigi facias. In B. R. the Filazer acts as the Exigenter: in G. B. the Exigenter is a distinct officer from the Filazer.

The writ of pluries capias, when sealed and returned, is the warrant for the Exigenter to make out the exigi faciar and

writ of proclamation thereon.

Every attorney shall file his warrant of attorney of the term wherein any Exigent is awarded, upon pain of forty fhillings for every time he offends, and is attainted by due examination of the justices of this court; such warrant to be filed upon or before the effoign-day of every Trinity term, and within twenty-one days after the end of every other term. Hil. 14, 15 Gar. 2. C. B.

No Exigenter shall receive any pluries capias, in order to make an exigent or proclamation thereon, before the same be figned or framped by the clerk of the warrants, or his deputy, to the end it may appear, that the warrant of attorney is duly

filed. Hil. 2, 3 fac. 2.

Plaintiffs, who intend to proceed to outlawry, generally lay their action in London, because defendants are sooner outlawed in London than in any other place, as the county days there

clamation must be filed with the Exigenta.tnsupers srom era

The writ of exigent therefore must go to the sheriff of the county in which the action is laid; as suppose London. But if the defendant lives in any other county, the writ of proclamation must go there, (whether a county palatine, or other franchise in England or Wales) according to the 31 Eliz. c. 3.

for avoiding fecret outlawries against persons having known places of dwelling.

The exigent should bear teste the quarto die post of the pluries. The writ of proclamation, by the same statute, must

bear the fame tefte and return as the exigent.

If the exigent goes into London, as is usual in outlawries, for expedition, carry it to one of the compters, where clerks attend for the purpose, who require the defendant, upon five several husting-days; and, if he does not appear upon the quinta

exactus, he is returned outlawed.

Upon receiving the writ of proclamation, the theriff muft, according to the statute of Elizabeth, make three proclamations, one in his county-court, one at the general quarter-sessions, and the other at least one month before the quinto exactus, at the church door of the parish where the desendant lives; or, if he lives out of a parish, then at the church-door of the next parish, upon a Sunday, after divine service; after which proclamations, if the desendant does not appear before the quinto exactus, he is pronounced outlawed by the coroner. Then the sherists return the writs—the return to the exigent specifies the five county courts when he was exacted; and the judgment of outlawry—and the return to the writ of proclamation particularizes when and where he was duly proclaimed.

If it happens that there should not be five county-days between the teste and return of the exigent, you may, upon application to the Exigenter, get an allocatur to bring in the days.

All outlawries pronounced, and no proclamation awarded and returned, according to the statute, are void. Stat. 31

El. c. 2.

The sheriff, for making the proclamation at the church-

door, shall have 12 d. Same stat.

No officer, in whose office the exigent shall be taken, shall take more, for making out the writ of proclamation, than 6 d. Stat. 6 Hen. 8. c. 4.

Of appearing upon the exigent, &c. vide post. p. 54.

When the exigent and proclamation are returned, the proclamation must be filed with the Exigenter, and the exigent taken to the clerk of the outlawries, if in C. B. [in B. R. the filazer executes this office also] who thereupon makes out a capias utlagatum, of which there are two forts, either the general or special capias utlagatum. The one against the defendant's body, the other against his body, goods and lands, into

as many counties as the plaintiff chuses either in England or Wales.

No sheriff, under-sheriff, their deputies, or bailiffs, shall set at liberty any person arrested upon any capias utlagatum, until he receive a supersedeas according to law from the proper offi-

cer appointed. 13 Car. 2. fl. 2. c. 2. f. 4.

No sheriff, under-sheriff, &c. shall set at liberty any person upon any writ of capias utlagatum, nor discharge the lands or goods of any person outlawed, without a lawful superseders, under the seal of the court.—Hil. 15, 16 Car. 2. But vide the statute 4 & 5 W. & M. c. 18. post. which empowers him to admit to bail, or take an attorney's engagement in writing to appear for him.

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### Of obtaining Satisfaction from the Outlaw's CHATTELS.

I F upon the special capias utlagatum any goods are taken, and the defendant is not likely to put in bail to the action, or does not move to superfede or reverse the outlawry, you may get a satisfaction out of his goods; but if the same do not amount to something considerable, so as to pay all the charges of petitioning, &c. and put the plaintiff something in pocket towards his demand, it will not be worth while to proceed.

If the plaintiff, in such case, thinks it worth his while to proceed, he must get the Sheriff to extend and appraise the goods by an inquest; which the sheriff will summon if requested, the plaintiff paying the charges thereof, amounting to about two or three guineas; and if it is necessary, the plaintiff may take out a subpeena for witnesses to attend and

give evidence upon the inquisition.

The inquisition being taken, get the capias utlagatum returned with the inquisition annexed, which must be carried, if in B. R. to the filazer, who acts as clerk of the outlawries, and if in C. B. to the clerk of the outlawries, who will transcribe the inquisition and transmit it into the Court of Exchequer. Which being done, apply to a clerk in the Remembrancer's office for a venditioni exponas, \* by virtue of which the sheriff will sell the goods. And if the money raised thereby exceeds not 201. the court of Exchequer, on motion, will order it to be paid to the plaintiff; but if it exceeds that sum, the plaintiff must petition the lords of the treasury for it, who refer it to their solicitor, to examine into the merits of the plaintiff's demand. The petition may be in this form.

To the Right Honourable the Lords Commissioners of his Majesty's Treasury.

The humble PETITION of A. B.

SHEWETH,

THAT C. D. late of —— being indebted to your petitioner in the sum of 1001. your petitioner did, at his very great charge in November last, prosecute the

<sup>\*</sup> But an eight day rule must be given on the back of the transcript, before any wenditioni exponas can be made to sell them; and if there are not eight days in term, the rule must be for the general seal after term. These days are allowed for any one to come in and claim the goods.

### Of obtaining Satisfaction from the Outlaw's CHATTELS.

faid C. D. to an outlawry; and by virtue of a special capias utlagatum, directed to the sheriff of Middleses, several goods of the said C. D. were seized, and found by inquisition to be of the value of 861. 4s. which goods were afterwards sold by the said sheriff, by virtue of a writ of venditioni exponas, at the same price and value at which they were so appraised; and the money thereupon saised still remains in the hands of the sheriff of Middlesex.

That your petitioner's faid debt, and the charge he has already been at in profecuting the faid C. D. to out-lawry, greatly exceed the fum so remaining in the

theriff's hands.

Wherefore your petitioner humbly prays your lordthips, that the money fo levied as aforefaid, may be paid over to your petitioner.

And your petitioner, as in duty bound, shall ever pray, &c.

A. B.

Reference thereon to the folicitor.

Whitehall Treasury-Chambers, Feb. 1, 1780.

The right honourable the Lords Commissioners of his Majesty's Treasury are pleased to refer this petition to to William Chamberlain, Esq; who is to consider the same; and report to their lordships a true state of the petitioner's case, together with his opinion what is sit to be done therein.

Grey Cooper.

After this reference, the plaintiff must make an affidavit, before one of the barons of the Exchequer, of his debt and proceedings against the defendant, and the charges he has been put unto; which affidavit, with the attorney's bill, vendition expans and return, together with a certificate of the proceedings on the outlawry from one of the sworn clerks of the Exchequer, must all be laid before the solicitor of the Treasury; and if he is satisfied of the truth of the premisses, he makes his report to their lordships accordingly; and thereupon a warrant goes from the Treasury to the Attorney General, to consent that so much of the money as remains in the sheriss's hands, after deducting the poundage, be paid to the plaintiss towards satisfying the debt and costs, on his moving

## Of obtaining Satisfaction from the Outlaw's CHATTELS.

moving the court of Exchequer for an order for that purpose. On delivering the warrant to the Attorney General, he gives his consent of course; then, on moving the court of Exchequer, an order is made for the sheriff to pay the money over to the plaintist, which, on sight thereof, he will accordingly do.

The fees and expences in all amount to about 201.

The order must be engrossed and put under seal, with a subpara annexed to perform it, (as in general all orders for payment of money, or where the party is ordered to perform any act must be) and the sheriff or party personally served therewith; otherwise, an attachment for non-performance thereof will not be granted.

Attached Book Diverse and Alletters

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### Of obtaining Satisfaction from the Outlaw's LANDS.

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IF the inquest upon a special capias utlagatum, finds the outland seized or possessed of lands, the different parcels, in whose tenure, and of what annual value beyond reprizes the same amount to, must all be set forth in the inquisition with convenient certainty. And then the prosecutor, by issuing writs of levari facias out of the Exchequer, for the sheriff to levy the profits, and on the return thereof, by suing out writs of venditioni expanses for selling those profits, and afterwards by petitioning to have the monies raised thereout paid to him in the manner before-mentioned, may obtain a satisfaction for his debt, and costs of the outlawry.

But if the profecutor's debt amounts to a confiderable furn, and the outlaw has a \* freebold interest in the lands, and does not come in and reverse the outlawry, and there is no incumbrance prior to the inquisition on those lands, then the profecutor may obtain a lease of those lands out of the Exchequer, or a grant thereof under the privy seal. To obtain a lease, it will cost the prosecutor 25 l. or upwards; but such lease being cheaper than a grant under the privy seal, it has a

preference to the other method of proceeding.

If the profecutor would have a lease of the lands found by the inquest, he may obtain such lease by applying to the lords of the Treasury, stating [in the nature of a petition] the amount of his debt, the proceeding to outlawry, and the substance of the inquisition on the capies utlagatum.

On presenting this petition, the secretary will make out a warrant for a particular to the Remembrancer of the Exchequer; whereupon the deputy remembrancer will certify a particular of the parcels of land, and value thereof, found

by the inquest afform to rectons

This particular being figned by the deauty remembrancer, must be carried back to the secretary of the Treasury, who will thereupon grant a warrant for a lease, which is made out at the Pipe-office of the court of Exchequer.

When the profecutor has obtained a leafe, if the tenants of the lands will not attorn tenants to the leffee, and pay their rents to him voluntarily, he may fue out writs of levari

I fay a freehold interest, because a chattel real, as a term for years, may be fold by a venditioni expense, but a freehold cannot; for an outlaw in civil cases does not forfeit his freehold lands, but only the profits thereof during his outlawry.

facias

## Of obtaining Satisfaction from the Outlaw's Lands.

facias from time to time, to levy the same as they become due; and when returned, the court of Exchequer, on motion and production of the lease, will order the sums levied, whether small or great, to be paid over to the prosecutor, or lesse, without any further application to the Treasury.

Under a leafe, or levari, the party may take the \* iffues and profits of the lands to the value extended, but neither the king, nor his lessee, can plow the land, nor cut the

wood or underwood upon it.

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As to iffues, the case of Britton and Cole, Salk. 395. Ld.

Raym. 305. and Com. 51. is worthy of notice.

On a levari facias to levy the yearly value of 55%. found by the inquifition upon an outlawry, on a judgment in debt. the sheriff took the beasts of a stranger levant and couchant on the land. Trespass being brought, the sherisf justified under the levari.—The court held, 1st, That by bare outlawry the party immediately forfeits his personal goods, and they are vested in the king; but he does not forfeit the profits of his lands, nor chattels real, till inquisition taken. And therefore that an alienation after outlawry, and before inquifition, is good to bar the king of the pernancy—but if he makes a feoffment after inquintion, the feoffee has the estate, but the king shall have the profits. 2dly, That the sheriff may well take the cattle of a stranger, levant and couchant, for they are the issues of the land, and the land is debtor: and if the law were otherwise, he might defeat the king of all by agifting the land; and there is better reason for their being liable in this case than for a rent charge, which is against common right, and by grant of the tenant. 3dly, That if there be a commoner, or another tenant in common with the defendant, his beafts may be taken on the land, unless the title of the commoner, or tenant in common, be found by the inquisition: and so it is, of a lease for years prior to the outlawry, for they are bound by the inquisition; and so is their title, till they avoid it by a monstrans de droit brought in the Exchequer. 4thly, If iffues be forfeited by a juror, and returned upon him, his feoffee is liable, nay,

What shall be accounted iffues, vide the stat: Westm. 2. c. 39. "And let the sheriff know that rents, corn in the grange, and all moveables sexcept horse, harness, and houshold staff]

<sup>&</sup>quot; be contained within the name of iffues." I. E

## Of obtaining Satisfaction from the Outlaw's Lands.

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he in reversion is liable, if the juror was only tenant for life; for this being a service for the publick, the inheritance itself is made debtor, and charged to answer it: otherwise, of the issues forfeited and returned upon an outlawry. The defendant, or his heirs, seossee or assigns, are liable, as claiming under the same estate which is charged with this debt, but it shall not charge him in reversion or remainder; for the forseiture arises from a particular default of the tenant, and not from a charge on the inheritance.

The sheriff under a levari, or prosecutor by virtue of a lease, must not take more than the value extended by the inquest; but if the value is greater than found, a writ of melius inquirendum may go to find the full value; and such writ may also go, if the inquisition is desective, and does not ascertain the outlaw's title, or the parcels of the land sufficiently.

Form of petition for a leafe of an outlaw's lands, at the fuit of a surviving executor.

To the right honourable the Lord's Commissioners of his Majesty's Treasury.

The humble petition of A. B. gent. furviving executor of the last will and testament of C. D. merchant, deceased,

Sheweth,

"That E. F. of — in the county of — esquire, being indebted to your petitioner's testator in his life-time,
by bond, in the penal sum of one thousand pounds of
lawful money of Great-Britain, conditioned for the payment of sive hundred pounds, with lawful interest for the same,
from the twenty-first day of May, which was in the year
of our Lord one thousand seven hundred and seventy-eight;
Your petitioner, as executor of the last will and testament
of the said C. D. deceased, did, at very great costs and
charges, in the month of October, which was in the year
of our Lord one thousand seven hundred and eighty, in
due manner, prosecute the said E. F. to outlawry; and
be virtue of a certain writ of special capias utlagatum,
siffued upon the return of the writ of exigi facias, against
the said E. F. directed to the then sheriff of —; O. P.
esquire, then sheriff of the said county of — did return
to the said writ of special capias utlagatum, to him directed,

# Of obtaining Satisfaction from the Outlaw's Lands.

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" an inquisition taken at the dwelling-house of J.S. called " or known by the fign of the White Lion, in -" faid county, on the second day of January, in the year of our Lord one thousand seven hundred and eighty-one; by " which it was found, amongst other things, that the faid " E. F. the outlaw, on the faid twenty-third day of October, in the year of our Lord one thousand seven hundred and " eighty, on which day he was outlawed at the fuit of your " petitioner, as furviving executor of the last will and testament of the faid C. D. deceased, was seized for the term of " his natural life, of, and in all and fingular the meffuages, " tenements, and hereditaments, with the appurtenances hereinafter particularly mentioned and expressed, being in the whole of the clear yearly value of two hundred pounds of lawful, money of Great-Britain, beyond all reprizes; that is to Jay, of and in a capital messuage, or mansion-house, with the appurtenances, called - and three other meffuages, or dwelling-houses, with the appurtenances thereunto adjoining, commonly called, or known by the several names of and also of one water corn grift mill, with the appurtenances, called - and also of and in two bundred acres of arable, meadow, and pasture land, or thereabouts, with the appurtenances; all which faid premises were situate, Randing, lying, and being, in the parish of - in the said county; " and were in the tenure, possession, or occupation of and that the said E. F. was, on the said twenty-third day of October, seized of, or entitled unto, in see simple, a free of and through a certain river, called — in the fishery of and through a certain river, called -parish of - in the said county; and that - in the faid county; and that the Tame was of the clear yearly value of fix pounds, beyond all reprizes, a and was then fet to and was then set to for that rent, as tenant thereof to the said E. F. And that the said outlaw was not " found in the bailiwick of the faid sheriff, as by the return " of the faid writ of special capias utlagatum, now remaining " of record in his majesty's court of Exchequer, amongst other things, may more fully and at large appear. " your petitioner further sheweth unto your lordship, that " the faid outlawry still remains in full force and effect, not " vacated, superseded, reversed, or annulled; and that your " petitioner's faid debt and interest, together with the costs " and charges which he has already necessarily been put " unto, in profecuting the faid E. F. to outlawry, amount " to a large sum of money; that is to say, to the sum of-

# Of obtaining Satisfaction from the Outlaw's

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and upwards. By reason whereof, your petitioner hath been, and is, wholly prevented and hindered from administering the effects of the said C. D. the testator, and sulfilling the duty and trust reposed in him, as the surviving executor of the said C. D. deceased. Wherefore your petitioner humbly prays your lordship's favour and interposition, that by and with the consent of his majesty's Attorney-General, in this behalf obtained, a lease may be made to your petitioner, by and from his majesty's court of Exchequer, whereby your petitioner may be enabled to levy, take, collect and receive, the issues and profits of the said outlaw's lands, tenements, and free fishery, so found by the said inquisition, to the value thereof, respectively appraised and extended, till such time as sufficient thereout shall be made, collected and levied, to sait sty your petitioner's said debt, interest, costs and charges; or until such time as the said E. F. shall cause the said outlawry, so had in due form of law against him, to be reversed or annulled. And your petitioner, as in duty hound, shall ever pray, &c."

If the inquest should undervalue the land, or if all the autlaw's lands or effects should not be discovered at the time of taking the inquisition, or if there should be any defect in the return, a writ of malius inquirendum may go from the Exchequer; on which the Sheriff must summon another inquest, and enquire more particularly, and return the inquisition, which he shall thereupon take, to the Barons.

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### Of superseding the EXIGENT before Outlawry.

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I F the defendant has notice that an exigent is iffued out against him, and would avoid the outlawry, he must find out to what Sheriff the writ is directed, and get a note of it, particularizing at whose suit, the cause of action, and when the exigent is returnable; from which note, the Filazer in B. R. or Exigenter in C. B. will make out a supersedeas on the defendant's attorney entering an appearance; which supersedeas must be carried to the Sheriff for his allowance thereof, before the return of the exigent\*.

The supersedeas is a writ taking notice of the exigi facias having issued, at whose suit, and for what cause; and orders the Sheriff to forbear surther proceedings, as the defendant duly appeared in court before the issuing thereof, and offered to answer the plaintiff; although the fact, perhaps, is the con-

If the defendant thus supersedes the exigent before outlawry pronounced, no bail is required, let the debt be ever so large: Whereas, if a defendant supersedes or reverses an outlawry had against him, he must put in bail, if he was outlawed by a special original requiring bail.

The supersedeas to an exigent must be delivered to the Sheriff before the return of the exigent. Barnes, 319.

In superseding the exigent, the defendant must pay the

plaintiff the costs he has been put unto by his proceedings.

Proceedings on an exigent post ca. sa. were stayed on motion, defendant after the teste and before the return, becoming

a prisoner in the Fleet, and plaintiff left to charge him in execution. Speed v. Barber. Barnes, 321.

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<sup>\*</sup> The fees amount to about 10 s. - 2 s. for entering the appearance, - 3 s. the *superfedens*—duty, 1 s. 6 d, feal, 7 d. and allowance by the Sheriff, 2 s. 4 d.

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Of appearing to the EXIGENT, and of reversing the OUTLAWRY by Motion, on coming in GRATIS.

Manuall's debt and colle Pormerly, if the defendant appeared upon the exigent though the debt originally required bail, yet the de. fendant was not obliged to put in bail; but the courts now hold, that if the defendant stands out to be outlawed, and will then come in, [i. e. voluntarily come in] and the cause of action requires bail, he must put in bail, as appears by Campbell v. Daley. Bur. Rep. 4 pt. 1920. The queltion was, whether in a case originally requiring special bail, and the defendant standing out to an outlawry, he can come in and appear to the outlawry without putting in special bail? Per curl There ought to be special bail: sit would be unreasonable, that a defendant should gain an advantage, by franding out until process of outlawry. He certainly ought not to be in a better case then, than if he had appeared at first. And accordingly direction was given, " that the Filazer should not iffue a supersedeas till the defendant had put in special bail.". And a week was given him for that purpole on waltur

Instead of driving the party to a writ of error, to reverse an outlawry had against him, the court will, at this day, in most cases, relieve upon motion, where the party comes in gratis upon the exigent, if the proceedings have been

irregular or unlawful.

A writ of supersedeas to an allocatur to the exigent could not be fealed in the morning of the day whereon the allocatur was returnable, it being an holy-day, but was fealed and brought to the Sheriff's office in London, about an hour after the defendant was returned outlawed. The proceeding was by special original in an action on the case on promises, which required bail. Motion and rule was to . Thew cause, why defendant should not have leave to appear, and supersede the exigent on payment of costs. On hewing cause, the court was not willing to strip the plaintiff of an advantage which he had fairly and regularly obtained. Before a defendant is returned outlawed, he may superfede the exigent, though founded on a special original, and though the debt be ever so large. But after he is returned outlawed, he cannot reverse the outlawry without bail; who are to be absolutely bound to pay the money, without power to render the principal in their discharge. Ordered, that proceedings on the outlawry be flayed on payment

Of appearing to the EXIGENT, and of reverling the OUTLAWRY by Motion on coming in GRATIS.

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payment of the plaintiff's debt and costs within a month; but in default, the rule to be discharged, and plaintiff at liberty to proceed on the outlawry. Challing v. Fax. Barnes, 326.

It appeared that, pending the exigent, defendant was a prisoner in the gaol for the city of York, for which reason the court ordered the outlawry to be reversed, without payment of costs to the plaintiff, upon defendant's entering a common appearance. Barnes, 321. Heely v. Hewson.

An outlawry had against a bankrupt was reversed on motion. Anon. B. R.

The outlawry was commenced and compleated, during the defendant's residence in Ireland; and, on motion, it was ordered, at his expence, to be reversed, without bail or appearance. Where the court see an unlawful proceeding, they will not put the party to the expence of a writ of error, but will avoid circuity, and relieve him in a summary way. Barnes, 325. Reilly v. O'Connor.

Motion to reverse outlawries on common clausum fregits, at the plaintiff's expence, on affidavits of defendant's publick appearance and dealings, sworn by themselves only. Per cur. Let the rule be enlarged until next term, that the plaintiff's attorney may, in the mean time, make satisfaction to the parties. Barnes, 320.

Rule to shew cause, why outlawry should not be reversed at plaintiff's expence. It appeared that two writs had been sued out, and desendant could not be arrested. He lived on the confines of Surry and Kent; and when the Surry bailiff came to arrest him, he jumped over an hedge into Kent, and put the bailiff to desiance. Per cur. Though the defendant is sworn to appear publickly, yet it is plain he kept out of the way to prevent being arrested. Rule discharged. But, by consent, the debt and costs to be paid out of the money in the Sherist's hands; and the overplus paid to the desendant. Holman v. Brasier. Barnes, 320,

On motion to reverse an outlawry, the defendant, and three others, swore that he was always visible, but the court refused, and required positive affidavit, that he might have been served with process.

On motion to superfede an outlawry, it was objected by defendant, that he was a publick visible man; and that the return

Of appearing to the Exicent, and of reverling the OUTLAWRY by Motion on coming in

GRATIS.

return of the proclamation was bad, it importing, that proclamations were made as the Sheriff was by the writ commanded, but not where on according to the form of the statute. That the defendant was a publick wisible man, was denied: and it was fully proved that he absconded; and his living was under a fequestration. The court feemed to think, the return of the proclamation was fufficient; but faid, that as to that, the defendant might bring a writ of error. And the rule to shew cause, why the outlawry should not be reversed, at the plaintiff's expence, was discharged. Dale v. Robinson, clerk. Barnes,

effectually to expedite Million ince expense. Rule to fliew cause, why outlawry should not be reversed at the plaintiff's expence. Objected, on the part of the defendant, that he was a publick visible man, and that the plaintiff had not endeavoured to arrest him. That the copias, alias, and pluries, were all fued out at the fame That no affidavit of the debt was indorfed on the writs, (though bailable) purfuant to the statute to prevent vexatious arrests. That no date was on the writs, as required by the statute. The affidavits, as to the defendant's visibility, were fully answered, and his total absconding proved. And the court held, that in case of a total absconding, no endeavours to arrest are necessary, That fuing out the capias, alias, and pluries together, was regular, and warranted by constant practice. That on process to outlawry, no affidavit for bail is required by the statute, or the course of the court, nor is a date to such process ufual. Rule discharged without costs, Farmworth v. Smith. Barnes, 322.d , mid ved share for save , men and alguord

If defendant goes beyond sea after the teste of an exigent, he may be regularly outlawed. A. Roll. Abn. 84. pl. 3.

Barnes, 221 of a mi melendah delendant in a file 125, tenta

Three feveral outlawries had been pronounced above a year, and transcribed into the exchequer, one against A. and B. a second against A. and the third against B. all at the plaintiff's profecution. Penvold and Roberts, authorized by power of attorney executed by defendants, applied on their behalf, and obtained a rule to how cause why these outlawries should not be reversed at plaintiff's expence, defendants at the time the writs of exigent issued, and still be-

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Of appearing to the Exigent, and of reverling the OUTLAWRY by Motion on coming in GRATIS.

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ing in parts beyond the feas. On flewing cause it appeared, that defendants had been abroad three years, and probably never intended to return; and it was urged, that as they flay abroad longer than their lawful occasion required, such stay must be looked upon with a view to defeat justice; and consequently, they were duly outlawed. That if not, they ought to bring their writ of error, and should not be relieved by motion. The court thought it discretionary in them to relieve by motion, or put the parties to a writ of error, according to the circumftances of the cafe. Courts have gone further of late years, than heretofore, on motions, as more effectually to expedite justice, save expence, and preferve credit and characters. There is no fufficient foundation for the court to order the plaintiff to reverle these outlawries at his own expence. But as they are not special, but only common claufum fregits, defendants have a right to reverse them at their own expence, on entering common appearances and payment of costs. Rule made accordingly. Defendants, before the outlawries were transcribed into the Exchequer, might have reverted them, on entering common appearances, and payment of common costs, as far as the exigent; but now, after they are transcribed, costs must be paid to the time of the reversal. Barnes, 324.

Defendant was outlawed while relident at Jamaica, for a debt contracted in England, and was abroad when the proceedings to outlawry were first commenced. On shewing cause on a rule made, why the outlawry should not be reversed at the plaintiff's expence, it appeared, that the defendant was an absconding person; and that the motion. though in his name, was not made by him, but by a third person; and the matter appearing to be a contention between creditors, the court would not exercise a discretionary power, fo as to relieve the defendant in a fummary way: The plaintiff has had no remedy for his debt: The court will not take from him the legal advantage he has got .-The defendant, if he thinks fit, may bring his writ of error.

Rule discharged. Barnes, 325.

After the return of the exigent, but whilft it remained in the hands of the Sheriff, and before the defendant was returned outlawed, the court made a rule, that a supersedeas time the writs of cargent illued, and fill

Of appearing to the EXIGENT, and of reverling the OUTLAWRY by Motion on coming in GRATIS.

to the exigent should be allowed on payment of costs.

Withall v. White. Barnes, 323.

After outlawry pronounced, defendant moved to set aside the outlawry for want of proclamation. Per cur. This is not a fit matter to be determined in a summary way; the desendant may bring his writ of error. Barnes, 323.

Note, Outlawries pronounced without proclamations, are

void by the 31 El. c. 3.

Motion that plaintiff might reverse an outlawry at his own expence, the defendant being in parts beyond the seas at the time he was outlawed. Per cur. The defendant may take advantage of this by writ of error; but it is no matter of irregularity. Blunt v. Beale. Barnes, 320.

Ibid. 319.

The plaintiff having commenced a proceeding to outlawry against desendant, he gave notice to the plaintiff that he had appeared, and obtained a supersedeas to the exigent. Plaintiff searched at the Compter, [as the outlawry was in London] and no supersedeas being allowed there, desendant was returned outlawed, who moved to set aside the outlawry. On shewing cause, desendant alledged, that he had entered an appearance with the Exigenter; but that appeared to be unnecessary, and a novel imposition by the Exigenter. The court held, that the supersedeas is in itself an appearance, if delivered to the Sheriff before the return of the exigent; but that not having been done, the desendant is regularly outlawed; and the rule to shew cause, why it should not be reversed at the plaintiff's expence, was discharged. Barnes, 319.

In C. B. it was moved, that the plaintiff might reverse an outlawry at his own charge, upon affidavit that the defendant was actually in the Fleet, in execution for the plaintiff in another suit, and that he knew it; and it was granted, because the plaintiff should have brought him to the bar by babeas corpus, and there have charged him with a

new declaration. Adlame v. Colebatch. Salk. 495.

A writ of allocatur on the exigent had issued [after judgment and ca. fa.] returnable the first return of Michaelmas, whereupon defendant was returned outlawed 16th of July preceding. It appeared, that the plaintiff died 6th of Aug. and that a commission of bankrupt issued against defendant

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on the 21st of August, preceding the return of the exigent. Defendant obtained a rule to shew cause why proceedings should not be stayed, which rule was discharged; the court being of opinion, that the writ and return must be filed, notwithstanding the plaintiff's death after the outlawry: Before an actual affignment by commissioners of bankruptcy, the crown is not bound, though there is a great difference between an extent in aid pro rege, and an outlawry for a private person's debt. Here is no foundation to tie up the plaintiff's hands; the plaintiff [meaning the representative of the original plaintiff may proceed if so advised. French

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v. Manby. Barnes, 323.

It was the practice in the Common Pleas, before the flat. 4 & 5 W. & M. c. 18. to allow a defendant, upon appearance by attorney, to reverse the outlawry, and not to require an appearance in person. But in the King's Bench, no one in any cale, civil or criminal, could reverse an outlawry, without an appearance in person, till that statute, unless where, ex speciali gratia upon a reason assigned to the court, they indulged him to appear by attorney, as in fickness, &c. Cro. Jac. 462. but then the entry was, that he came in person " Quod venit in propria persona," the law being clear, that upon an outlawry he ought to appear in person. Vide Carth. 7. Skin. 16. Salk. 496. But to remedy the inconvenience and expence attending an appearance in person, that statute enacts, "That no person who is or shall be outlawed in the said " court, for any cause, matter, or thing whatsoever, [treason " and felony only excepted] shall be compelled to come in " person into, or appear in person in the said court to reverse " fuch outlawry, but shall or may appear by attorney and re-" verse the same without bail, in any cases, except where " special bail shall be ordered by the faid court." plaintiff in another furt,

granted, because the plaintiff should have brought him to the bar by babeas cor vs. and there have charged him with a Adlams v. Colebateb Saik 404 monstalosb went

A writ of allocature on the exigent had thired lafter judg ment and car fall returnable the first return of Mhobacimas subereupon defendant was returned outlawed 16th of July

10 preceding. It appeared, that the plaintiff died belt of the and that a committion of cankruptiffued against defendant

Of appearing to the EXIGENT GRATIS, and of reverling the Outlawry by WRIT of ERROR.

THE courts, inflead of driving the party to his writ of error to reverse an outlawry had against him, will mostly, as appears from the foregoing cases, relieve him on motion, where the proceedings have been irregular; but in doing this, the courts always require, that the defendant pay the plaintiff his costs up to the exigent, unless where the plaintiff has proceeded intentionally irregular, and with a view to oppress. But where the defendant is driven to his writ of error to reverle the outlawry, either upon coming in upon the exigent, &c. gratis, or brought in upon the capias utlagatum, he must, in all cases, pay the plaintist his costs to the outlawry; and, where special bail is required, he must put in bail, either before error can be brought to reverse the outlawry, or elfe upon the reverfal.

By the 31 El. c. 3. f. 3. it is enacted, " That before any allowance of any writ of error, or reverling any outlawry be had, by plea or otherwise, through or by want of any proclamation to be had or made, according to the form of this statute, the defendant and defendants in the original es action shall put in bail, not only to appear and answer to the plaintiff in the former fuit, in a new action to be com-" menced by the plaintiff for the cause mentioned in the first action, but also to fatisfy the condemnation, if the plaintiff fhall begin his fuit before the end of two terms, next after " allowing the writ of error, or otherwise avoiding of the

"faid outlawry."
This statute requires bail to be put in before the allowance of error, only where the error is for want of proclamations. But for any other cause than for want of proclamations, it is sufficient if bail is put in before the reversal of the outlawry, by the writ of error, if the original cause of action required bail.

As where error was brought to reverse an outlowry in Chefter; to which the defendant in error pleaded, that no bail was put in before the allowance of the writ of error, according to the 31 El. c. 3. Per cur. This is no plea, for it is well enough, if bail be put in at any time before the reverfal. The error was the want of procomitatu. Wilbrahamy, Doy-

Ly, Ld. Raym. 605, ton the sold red of the sold of the process, the defendant in error moved to quash the writ, Of appearing to the Exigent GRATIS, and of reverling the Outlawry by WRIT OF ERROR.

because no bail was given. Sed per cur. That is never done till the outlawry is reversed; and then we take bail to appear to an original, to be brought within two terms. Duckett

v. Martin, Stra. 951.

If a party comes in gratis, upon the return of the exigent, he may be admitted by motion to reverse the outlawry, for any other cause than want of proclamations, without putting in bail. If he comes in by cepi corpus on the capias utlagatum, then he shall not be admitted to reverse it without appearing in person, as in such case he was obliged to do at common law; or putting in bail with the sheriff for his appearance upon the return of the cepi corpus, and for doing what the court shall order. Appearing by attorney is an induspence by 4 & 5. W. & M. and the bail is to be special or common in this as in other cases. Salk. 496. But wide the case of Campbell v. Daley, Burr. 4 pt. 1920. Where it was held, that a defendant, coming in after outlawry, must put in special bail, before supersedeas or reversal of outlawry, if the original cause of action required special bail: which determination seems to have been sounded on the case of Serecold v. Hampson, bart.

Stra. 1178. 1 Wilf. 3. which was as follows:

The defendant was outlawed in a personal action, without any affidavit of the plaintiff's demand: and having brought error, he affigned his being beyond fea at the time of the outlawry; for which the court made no difficulty to reverle it; but the question was, upon what terms they should do it, the plaintiff infifting on special bail, and having now made a proper affidavit; and the defendant infifting to file common bail only, -The court, upon confidering of the 4 5 5 W. & M. c. 18. f. 3, which impowers the outlaw to appear by attorney, [as he did here] and fays, it shall be reversed without bail in all cases but " where special bail shall be ordered by the court," declared, they were of opinion, they had a diferetionary power to require it or not; and that the want of an affidavit before was no objection, because that is only requisite to warrant an arrest: and here was one in time for the new action that must be brought. And though the 3r Eliz. c. 3. f. 3. is the only act that requires bail, it is not to be inferred from thence, that in other cases it ought not to be insisted on, for that act makes a new error, and the bail upon it is absolutely to pay the condemnation money. Of Of the Arrest upon the CAPIAS UTLAGA-TUM, of Bail thereon, and of reverling the Outlawry by WRIT OF ERROR afterwards.

IF a defendant was arrested upon the capies utlagatum, the theriff could not admit him to bail, as an outlawed person is excepted out of the flatutes of 23 Hen. 6. c. q. and 13 Car. 2. flat. 2. c. 2. (unless by supersedeas first had and

But by the 4 & 5 W. & M. c. 18. f. 4. it is enacted, "That if any person, outlawed in the \* said court (other " than for treofon and felony) shall be taken and arrested upon " any capies utlagatum out of the faid court, it shall and may " be lawful for the sheriff who hath or shall arrest such per-" fon (in all cases where special bail is not required by the " faid court) to take an attorney's engagement, under his hand, to appear for the faid defendant, and to reverse the " faid outlawry; and thereupon to discharge the said deer fendant from such arrest: and in those cases, where special " bail is required by the faid court, the faid theriff shall and " may take security of the said defendant by bond, with one or more sufficient sureties, in the penalty of double the " fum for which special bail is required, and no more, for " his appearance by attorney, in the faid court, at the return " of the faid writ; and to do and perform such things as " shall be required by the faid court; and, after such bond " taken, to discharge the said defendant from the said ar-" reft."

And by feet. 5. it is further enacted, " That if any person " outlawed as aforesaid, and taken and arrested upon a capias " utlagatum, shall not be able, within the return of the said writ, to give security as aforesaid, in cases where special " bail is required, so as he be committed to gaol for default " thereof, that whenfoever the faid prisoner shall find sufficient security to the sheriff, in whose custody he shall be, for his appearance by attorney in the faid court, at some

<sup>&</sup>quot; The faid court," means the court of King's Bench; the statute being made to prevent malicious informations in the court of King's Bench, and for the more easy reversal of out-lawries in the same court. But notwithstanding, all persons ar-rested upon the capias utlagatum out of the Common Pleas, after outlawry there, have always been bailable since the making thereof, and before might have been discharged by a supersedius to the capias utlagatum. Vide fect. 4. in 13 Car. 2. c. 2 " return

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return in the term then next following, to reverse the faid coutlawry, and to do and perform fuch other thing and things as shall be required by the said court; it shall and may be lawful for the faid fheriff, after fuch fecurity taken, " to discharge and set at liberty the said prisoner for the " fame."

It is the allowed practice of the court of Common Pleas to fuffer a defendant coming in by capias utlagatum, the fame term on which an exigent is returnable, to avoid the outlawry without writ of error, by shewing, that he purchased a supersedeus out of the same court, and delivered it to the theriff before the quinto exactus, &c. or by thewing any other matter apparent on the record, which makes it erroneous, as the want of original, or the omission of process, or want of form in a writ of proclamation, &c. or a return by a person not appearing to be theriff, or a variance between the original gent, or other process, or the want of such addition, St. as is required by the I Hen. 5.—Yet, it is faid, in many books, to be the confrant course of the court of King's Bench, never to reverse an outlawry on the crown side, either in the same or a different term, for these or other errors of a like nature, without a writ of error. 2 Hawk. P. C. 458. and leveral authorities there cited.

But, in civil cases, the King's Bench, as well as the Common Pleas, at this day, will generally reverse an outlawry on motion, as is feen in the foregoing pages, without driving the party to his writ of error, whether he comes in in the same term or another, or upon the exigent or capies utlagatum. But, in relieving by motion, the court always have regard to the plaintiff's cause of action, and the situation he is in to-

wards the recovery of his debt.

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A. who was a foreign merchant, and never in England, was outlawed at the fuit of B. in an action on several promises for goods fold and delivered; and, on a special capias inlagatum, a thip, and other effects belonging to A. were feized, as forfeited upon this outlawry; and it was moved, that this outlawry may be vacated, and restitution awarded, upon affidavits produced and read, that the defendant was never infra legem, i. e. that he never was in England, and therefore could not be outlawed, because that was putting him extra legem. Sed per cur. This outlawry shall not be return

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vacated upon such affidavits; but the defendant may bring a writ of error; which he was compelled to do, and thereupon to put in bail to the action in which he was outlawed; and then the plaintiff consented to the reversal. Matthews v. Erbo, Garth. 459. Ld. Raym. 349. For, unless the court drives the desendant to his writ of error, in such cases, a person might contract debts, and then go beyond sea, and so be out of the reach of the law; therefore this is said to be a

good way to get bail of a foreign merchant.

In debt upon a bond entered into by the wife, dum fola, the husband was abroad and outlawed; and the wife, though she appeared publickly, waived. On motion to set aside the outlawry against the wife, and to restore her the goods taken on a special capias utlagatum, on assidavit that they were her separate goods, the court held, that the goods must be taken to be her husband's goods in point of law; and that, if she had any equitable right to them, she must resort to a court of equity: but, as she appeared publickly, she has been wrongfully waived; and therefore the rule was made absolute for setting aside the outlawry against the wise, but discharged as to restoring the goods. Biscoe v. Kennedy and his wise, in C. B. 2 Will. 127.

Defendant was taken on a capias utlagatum on a Sunday, and therefore he moved to be discharged, the taking being contrary to the stat. 29 Car. 2. But, notwithstanding the court held the taking bad, they refused to grant an attachment, and put the defendant to take the remedy given by the

flatute. Ofborne v. Carter, Barnes, 319.

Defendant was waived specially on mesne process, as a single woman by the name of Dunster; and after the exigent, and before the outlawry, she married one Priseley; and, on being taken by a capias utlagatum, after the outlawry, on motion, a rule was obtained to shew cause, why the outlawry should not be reversed, at her husband's expence, on his entering a common appearance for himself and his wise. But the rule was discharged, the court resusing to interpose in a summary way, as the marriage was after the exigent. White y. Dunster, Barnes, 321.

H. was outlawed in two actions, one was 10 l. the other 40 s. and, upon reverling the outlawry, the court took special bail for the first, and an appearance for the other; the

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recognizance was taken purfuant to the 31 El. c. 3.

Salk. 496.

Two persons were outlawed in a joint action against them, and one moved, that, on filing common bail, she might have liberty to reverse the outlawry. Sed per cur. The writ of error, to reverse the outlawry, must be brought in the name of both the parties that are outlawed; and, if one only appears, the other may be summoned and severed, and then the outlawry may be reversed for the benefit of the party appearing only. Symmons v. Bingoe and Cooke. B. R. Salk. 406.

Defendant being arrested on a capias utlagatum, the theriff took an attorney's engagement, under his hand, to appear for the defendant and reverse the outlawry, without taking security, by bond, in double the fum for which bail was required, pursuant to the act of 4 & 5 W. & M. c. 18. On flewing cause, why an attachment should not iffue against the sheriff for discharging the defendant out of his custody, it was urged, that he neither did nor could know, that it was a cafe requiring bail, as the capias utlagatum was not marked for bail; and that 12 Geo. 1. c. 29. required an affidavit; and that the fum, for which bail is to be taken, is to be marked on the process, &c. For the plaintiff, it was urged, that process of outlawry is not within the stat. 12 Geo. 1. that this was by special original; and the cause of action was expressed in the original process, in which it appears he was entitled to bail.—The court were clear, that this was not a case within the 12 Geo. 1. and thought the sheriff had acted improperly; but, as there was an affidavit of the under-sheriff, that he had acted to the best of his understanding, without any ill intention, they enlarged the rule in order to give the sheriff an opportunity to put in bail. After which the sheriff undertook to pay the debt and costs. Cracraft v. Gledowe, Burr. 4 pt. 1482.

A. owed money to B. on judgment, and to C. on a bond. A. was outlawed at the fuit of the obligee, and his lands feized on the outlawry; and the question was, whether the conusee of the judgment could extend these lands; and it was held the outlawry should be preferred, and that the King's hands should not be amoved, unless the conusee could shew covin and practice between the obligor and obligee. Salk. 495.

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A N action on the case lies for the escape of a prisoner outlawed. Stra. 901. i.e. A qui tam action on the case, if outlawed on mesne process; the plaintiff having an interest and a damage, and the king an interest for the forfeiture.

But if outlawed, after judgment, it seems debt lies for the escape at the suit of the plaintiff only. Vide Cro. El. 706.

Upon the reversal of outlawry, the party is restored to all

he has loft.

If the goods of a person outlawed are sold by the sheriff, upon a capias utlagatum, and after the outlawry is reversed, he shall be restored to the goods themselves; because, the sheriff was not compellable to sell those goods, but only to keep them to the use of the king. 5 Co. 90. Hoe's case. Roll. Ab. 778. S. C. cited. Cro. El. 278. S. P. adjudged. And vide 2 Jon. 101. 2 Show. 58. pl. 52. 3 Keb. 871. There shall be a restitution of profits actually paid into the Exchequer.

At common law, goods and chattels only were liable in personal actions; and as process of outlawry, in personal actions, was given by statute, goods and chattels only still remain liable, because they were only chargeable in personal actions, i. e. They are forseited to the king, and he shall have the pernancy of the chattels real; but this is by consequence only—the party being extra legem, is thereby

become incapable to take the profits himfelf.

A writ of error to reverse an outlawry in any civil case, is not often heard of now, as the party generally comes in and reverses it by motion, and satisfies the debt and costs, or justifies bail to appear to a new original; or, is special bail is not required, enters a common appearance; in which case the outlawry is reversed of course before a judge, or in court, by confession of some trisling error in the proceedings; as, the omission of any letter, irregularity in any of the process, want of proper addition, want of proclamation, want of proclamation, want of siling the writ of proclamation, or, in short, any trisling matter whatever; which, in such cases, is usually confessed by the plaintist. For, as the intent of proceeding to outlawry is answered, either by the payment of the debt and costs, or by having good bail put in to

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fand the event of the action, any objection to the reverfal

of the outlawry would be idle and nugatory.

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In order to reverse an outlawry, without an actual write of error, the desendant's attorney (having entered an appearance) gets a copy of an exigent, on which is usually marked the error; which being pointed out to the Secondary or prothonotary, and then shewn to one of the judges, if in court, or to a judge at chambers, a certificate is made thereof, if in court, or an order, if before a judge, to the Clerk of the outlawries of the said reversal.—On sight of which order or certificate, the Clerk of the outlawries marks the outlawry book, discharged; and then the reversal is drawn up in paper, and entered upon the roll, and the de-

fendant is thereupon restored in statu quo prius.

This is the usual way where a person is outlawed, and neither his body, goods, or lands, seized upon the capias utlagatum. But if his body, goods, or lands be seized, then his attorney must go to the Glerk of the errors; and on putting in special bail, if requisite, he will make out a supersedeas to discharge the person or his effects, if taken, or if not taken, then for the sheriff to sorbear. But if a man be butlawed after judgment, a reversal in the manner before mentioned will not be allowed; for an outlawry after judgment cannot be reversed till the plaintiff hath acknowledged satisfaction on record, or the defendant hath paid the money into court.

When a defendant to reverse an outlawry is obliged to fue out an actual writ of error, he must apply to the proper cursitor for the writ; who, on a pracipe given him, will

make out the writ, which is to this effect:

England, to wit, George the third, by the grace of God, Sc. To our justices assigned to hold pleas before ourself, greeting. Because in the record and proceeding, and also in the pronouncing the outlawry against C. D. late of London, merchant, in a plea of trespass on the case, whereon he is outlawed in London, pronounced before us returned, as it is said, a manifest error hath happened to the great damage of him the said C. as by his complaint we have understood. We being willing the error, if any hath been, should be duly corrected, and full and speedy justice

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done to the said C. in this behalf, command you, that if the outlawry aforesaid is returned before us, as it is said, then, the record and proceedings aforesaid being inspected, you further cause to be done therein, for the error and vacating of the outlawry aforesaid, what of right, and according to the law and custom of England, shall be meet to be done.

Witness ourself at Westminster, this — day of — in the twentieth year of our reign.

When the writ of error is duly made out and fealed, the defendant must get it allowed by the court, on which allowance the allocatur is subscribed.

If the error is in the exigent or return, or allocatur, or in the writ of proclamation or return thereto, [having first put in bail according to the statute] or in any of the proceedings, he gets a copy thereof, and spreads the whole record, and affigns the errors in this manner:

Afterwards, to wit, On--next, after fame term, before the lord the king, at Westminster, comes the faid C. D. by — his attorney, and immediately fays, that in the pronouncing of the outlawn aforefaid, there is manifest error in this, to wit, that the return of the faid writ of exigi facias, and also the faid writ of allocatur, are infufficient, invalid, and void in law; therefore, in that, there is manifest error: Then is error also in this, that no judgment of outlawry, upon the writ of allocatur aforesaid, is returned; therefore in this there is manifest error [and so on assigning the error or errors, as they happen to be]. And the faid C. D. prays the writ of our lord the king, to warn the faid A. B. to be before our lord the king, to hear the the record and proceedings aforefaid. And it is granted to him, &c.

If the plaintiff does not appear and confess the errors, the defendant must sue out a scire facias ad audiendum errors, &c. and upon two nihils returned, the court will reverse

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ores, verse the the outlawry of course: But if the plaintiff comes in voluntarily, or upon a scire feci, and does not confess the errors affigned, but joins in error, the defendant must make up error books, and proceed to argument and judgment, as in other cases of error; of which vide post, title Error.

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Of declaring after the Outlawry reversed or superseded.

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UPON the reversal or superseding of the outlawry, if the desendant does not pay the plaintist his debt and costs, the plaintist must proceed to declare, the desendant having, upon reversing or superseding the outlawry, put in special or common bail, as the case required, to appear to a new original.

Upon appearing and superfeding the exigent, the plaintiff must declare within fix or eight days after, otherwise the defendant may give him a rule to declare; and if no declaration comes in within the limited time, the defendant may non-suit the plaintist, and have his costs taxed. Compl.

Soll. C. B. 84.

So if the defendant appear by fupersedeas, and will not take a declaration, the plaintiff may have judgment against

him, by nil dicit. Ibid.

But where a defendant outlawed, causes the same outlawry to be reversed, the plaintiff has till the end of the second term after reversing the same, and notice thereof given, to declare in. But if he does not proceed within two terms next, after notice of reversing the outlawry, the defendant shall have his costs to be taxed. Reg. Tr. 33 Car. 2. C. B.

The declaration, after reversal or superseding of the outlawry, has no need to be laid in the fame county in which the former original was made. So held on demurrer. Lev. 245. Whitwick v. Hovenden. Where the original and outlawry were in London, and on the reversal of the outlawry, the plaintiff declared in Suffex; on which it was infifted, that the original being laid in London, the plaintiff could not declare in the action in another county, though the cause of action was transitory. But the Prothonotaries certifying, that the course of the court was, that although the original be laid in London, for expediting the outlawry, yet when the defendant comes in, the plaintiff may declare against him in any other county, be the action local or transitory. And the stat. 21 Fac. 1. c. 16 s. 4. giving the plaintiff generally a power to commence a new action or fuit within a year after the outlawry reversed, the plaintiff may do it in this case, to warrant his declaration delivered, within the course of the court. And the plaintiff had judg-

By the 21 fac. 1. c. 16. f. 4. it is enacted, "That if in any action brought by original, the defendant be outlawed,

# Of declaring after the Outlawry reversed or superseded.

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lawed, and shall after reverse the outlawry; that then the plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment of outlawry reversed, and not after."

And by the 31 Eli. c. 3. s. 3. it is enacted, "That before the allowance of any writ of error, or reversing of any outlawry, be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of the said statute, the desendant in the original shall put in bail, not only to appear and answer to the plaintiff in the former suit, in a new action to be commenced by the said plaintiff for the cause mentioned in the first action\*, but also to satisfy the condemnation, if the plaintiff shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry."

Though this latter statute relates only to the reversing the outlawry through want of proclamation, and discharges the bail in such case given, if the plaintist does not proceed within two terms after the reversal—yet the recognizance of bail, upon the reversal of outlawry for other causes than for want of proclamations, has mostly been taken since the making thereof according to this statute. Therefore, if the plaintist does not declare after the reversal of the outlawry within two terms, the bail are discharged. But though they are discharged from their recognizance, the plaintist is not barred of his action, provided he commences the same within a year after the reversal of the outlawry, according to the 21 Jac. 1. c. 16. supra.

Bail upon the reversal of outlawry, cannot render their principal in discharge of themselves, for they are absolutely bound to pay the condemnation money.

Defendant was outlawed on a special original, and upon reversing the outlawry put in bail with condition as usual,

On this statute it is, that case will lie for the party against the Sheriff, for an escape upon an outlawry on mesne process: for though the party is in custody merely at the suit of the king, and the plaintiff has no interest in his body, yet he cannot have his outlawry reversed without security first given to appear to a new original. Fitzg. 265. Cro. El. 652. S. p.

Of declaring after the Outlawry reversed or fuperfeded.

to appear to a new original, to be filed within two terms. Plaintiff proceeded to judgment, and defendant brought a writ of error; a motion was made on behalf of the bail, to discharge their recognizance, no original having been filed within the two terms; and a rule made to shew cause, which was discharged. The bail may plead as they shall be advised. Carleton v. Wilkinson. Barnes, 86.

Upon superseding the exigent, if plaintiff delivers a declaration, there should be a notice to plead; and a rule given to plead before judgment, for want of a plea, can be signed. And defendant has, in such case, the same time

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to plead as in other cases. Barnes, 271, 272.

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### Of Restoration after Outlawry reversed or determined.

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EVERY outlawry determines upon the death of the party outlawed; and if the party was outlawed on a civil fuit, the representatives of the outlaw, shall have a restoration of the lands seized, or effects, if they remain in the Sherist's hands not disposed of. Whereas in criminal cases outlawry works an entire forseiture of the outlaw's estate, both real and personal.

But though outlawry determines upon the death of the outlaw, yet before the king's hands can be removed from the lands or goods seized, such death must be pleaded, and judgment entered up thereon in the Exchequer, upon the pleabeing confessed by the attorney general. And in like manner, if the outlawry is reversed [which must be done in the original court where the action was brought] for any other reason, a certificate of such reversal from the clerk of the outlawries must be pleaded and confessed, and judgment entered up thereon in the Exchequer before the king's hands can be removed.

In order to reverse an outlawry on death, there must be a certificate from the minister of the parish, where the party died or was buried; and likewise an affidavit of his death, by some person that was acquainted with him, and was present at the death or burial, in which affidavit the party should be described as in the outlawry.

These proceedings are in the nature of a suggestion upon the roll in the court of Exchequer—The judgment by the barons in fuch case is, " That his Majesty's hands be removed from " the possession of the premises in the inquisition mentionest. " -And that the faid A. B. [the representative or outlaw, as " the case is] be restored to his possession thereof, together " with the rents, iffues, and profits thereof, which have not " as yet been answered to his said Majesty; and that the said " lease, in form aforesaid made, be void and of no effect \*; and " that, as well as the faid R. S. late Sheriff of the county of " --- as all others who have been, now are, or hereafter " shall be Sheriffs of the said county, shall be discharged in " their accounts towards his faid Majesty, his heirs and suc-" ceffors, as well of the rents and profits of the faid premifes, " as of the faid annual rent of----which have not been an-" swered his faid Majesty; and lastly, that the said A. B. as

<sup>.</sup> In case a lease has been granted by the Exchequer.

#### Of Restoration after Outlawry reversed or determined.

to the faid premises, may be difinissed the court, by reason of the said consession, and other the premises."

The plea may be put in by any person: for though the judgment is that he shall be restored to the possession of the premises, yet it gives no title to the lands.

In order to discharge the Sheriff, the judgment-roll must be carried to the pipe-office, that a quietus may be made there-

upon.

If after such judgment any difficulty attends the getting possession, a writ of amoveas manus must be sued out of the Exchequer, directed to the Sheriff, who will thereupon de-

liver possession.

A merchant having 5001. Stock in the India company, was outlawed before judgment at the suit of W. R. The king, after inquisition and seizure, upon petition, granted the 5001. Stock to said W. R. and that he might sue for it in his own name. W. R. thereupon got the stock transferred to him, and then the merchant reversed the outlawry, and obtained restitution de omnibus quibus nobis non est responsum. And on question, whether he should have the stock back, the court held that W. R. should not restore it, because the grant was executed and vested in W. R. and as to that matter the king was answered.—Vide 2 Lev. 49.

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A Scire facias is a writ judicial, founded on some matter of record; as judgments, recognizances, and letters patent, on which it lies to enforce the execution of them, or to vacate or set them aside: and though it be a writ judicial, or of execution, yet it is so far in nature of an original, that a defendant may plead to it, and is in that respect as an action; and therefore it is held, that a release of all actions, or of executions, is a good plea in bar to a scire facias. Vide Bac. Abr. 4 Vol. 409. and authorities there cited.

A fcire facias lies for many purposes in law, the writ being formed according to the subject matter. But the writs of scire facias, which will be proper to be noticed in this work, are only of four kinds.—1. Of the scire facias against bail, after judgment had against the principal, on their recognizance forseited. 2. Of the scire facias to revive a judgment, by and against the same identical parties to the suit on which the judgment was had. 3. Of the scire facias to continue a suit, by or against the representatives of one of the parties dying before final judgment. And 4. Of the scire facias by or against the representatives of a party to the suit dying after judgment, and before execution.

The writ of fcire facias is adapted to the subject matter: For the various forts of which writ, see the several books of

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Of the Scire facias against Bail, and of Proceedings therein.

WHEN a defendant is admitted to bail by the court where the action is brought, his fureties or bail stipulate, that the defendant shall, if he be condemned in the action, fatisfy the plaintiff his debt and cofts; or elfe, that he shall surrender himself a prisoner; or in case he does neither, that they (his bail) will pay what the plaintiff recovers for Therefore after the plaintiff has recovered judgment in his action, he must, before ever he proceeds against the bail, look to fatisfaction from the defendant; and the plaintiff has his election of three forts of executions, either of which he is at liberty to pursue against the defendant, viz. by elegit against his lands and goods; by fieri facias against his goods only; or by capias ad satisfaciendum against his body; by which writ, he may be imprisoned till fatisfaction is made.—If the plaintiff proceeds by elegit or fieri facias, he aims at a satisfaction by a feizure of the defendant's property; and by taking out either of those writs of execution, he cannot fix the bail; but if he would look to the bail to make him fatisfaction, his execution must be by a capias ad satisfaciendum against the principal; and that is the only writ which has effect to fix the bail, as it amounts to a demand on him to furrender himselfa prisoner; which if not done by the return thereof, or if he is not furrendered by the bail in discharge of themselves, it is presumed that the bail are ready to pay the debt and damages recovered.

If the plaintiff therefore would ever refort to the bail, his execution must be by capias ad satisfaciendum against the principal; for then he shews, that he would have the body till satisfaction is made him; which writ of ca. sa. must be returned by the sheriff, with a non est inventus, for the bail

are liable only on failure of their principal.

In the court of King's Bench, the course is always to enter recognizances as taken in court, though actually by a judge at his chambers; and in that court they are not taken in a sum certain, as in the Common Pleas, neither are they records till entered.

But in the Common Pleas they are records immediately upon the first caption, and bind the lands before filed at Westminster; and when filed, they are records in court; and a scire facias, or debt, lies upon them either in Middlesex where filed, or in London where taken; whereas in the King's Bench, a scire facias, or action of debt thereon, must be brought in Middlesex.

When

## Of the SCIRE FACIAS against Bail, and of Proceedings therein.

When a defendant, against whom a judgment has been had, renders himself, or is surrendered by his bail in their discharge, notice of such surrender should be immediately given to plaintist's attorney, and an exoneretur entered on the bailpiece; for unless such notice is given, and the bailpiece discharged before the return of the ca. sa. the bail are fixed with

the debt and cofts in point of law.

When the recognizance is forfeited by the defendant's not being surrendered by his bail, or surrendering himself to prison, the plaintiff may either bring his action of debt on the recognizance, or proceed by scire facias, by which the sheriff is commanded to make known to them the judgment recovered, and the force and effect of their recognizance entered into, that the defendant has not surrendered himself to the prison of the marshal of the Marshalsea or Fleet, as the case is; and therefore, that they appear in court and shew cause, why the plaintiff should not have execution against them, for his debt and damages recovered.

A fcire facias was brought against three bailees or sureties, upon a recognizance acknowledged by them and the principal jointly; and on demurrer thereto, the writ abated; because this being sounded on a record, the plaintiff should set forth the cause of the variance from the record, as that one was dead. But if an action is brought upon a joint bond, against three only where there are sour or sive obligors, there the defendants ought to shew that it was made by them and others in full life, not named in the writ; because, the court shall not intend that the bond was sealed and delivered by all that are named in it; and therefore the defendants cannot demur upon it, though it be entered in hace verba. Allen 21.

In order to ground the proceedings by fcire facias against the bail, the plaintiff, before he sues out the writ of fcire facias, must enter the recognizance of bail on a roll, carry in the same, and docquet it; so he must if he proceeds by action of debt on the recognizance. The entry on the roll is to this

effect in B. R.

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Michaelmas term, 20th George the third (the term the declaration is of.)

Middlefex ff. A. B. complains against C. D. Sc. [go through the declaration] and the said C. D. by John Palmer, his attorney, comes and defends the wrong and injury, when, Sc. and thereupon E. F. of Charing-cross, in the county

### Of the Scire FACIAS against Bail, and of Proceedings therein.

A scire facias issued against the bail in B. R. tested 23d of June; returnable 30. It was left in the theriff's office 25th of June, and the same day a warrant issued, but it was not ferved on one of the bail till the 29th, and not on the other till the 30th in the morning, being the last day in term. No ca. far was returned and filed till the 31st, as it ought to have been. The bail on the last day of the term, viz. June 30th, after the rifing of the court, furrendered their principal, and afterwards moved that an exoneretur might be entered on the bail-piece, and proceedings flayed against them. But the court discharged the rule with costs, holding the return, and filing of the ca. fa. to be mere matter of form, if it is properly tefted, and made returnable and lies in the Sheriff's office the usual time, and is afterwards returned non eft inventus.—And they held the shortness of the notice to the ball immaterial. Hunt v. Cox. 1 Blacks. 393.

Motion to stay proceedings on a scire facias against bail, they not being served with a copy of the Sheriss's warrant, which recites the writ verbatim. But the one by giving him a personal summons, and reading to him the Sheriss's warrant: the other by leaving a memorandum (containing the substance of the writ) with his wise, at his house, in his absence. It appeared (on enquiry of the officers) that it is usual in Middlesex, to serve the bail, with a copy of the Sheriss's warrant; but not so in many other counties, and this arose in Lincolnsbire. In some counties they give verbal notice in some none at all. The court thought some notice should be given [Salk. 599.] the sufficiency of which, if disputed must be determined by the court upon the circumstances. And that this notice was sufficient, therefore discharged the rule. Wright v. Page. Tr. 12 Geo. 3 C. B. 2 Black

If the principal defendant dies after the return of the ca. fa. although his death be before the fuing forth the first facias, the bail are fixed with the debt and costs, in point of law; and the fire facias's are only an indulgence of the court. 2 Will. 67.

On a recognizance taken in B. R. the fcire facias multiple brought in Middlefen. 3 Dany. Abr. 313. for the recognizances in B. R. are not obligatory by the caption, but by their being entered of record in the court. Salk. 600. 659. Hob. 195. Brownl. 69. S. C. Moor 883. S. C. Styles 9. But

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#### Of the SCIRE FACIAS against Bail, and of Proceedings therein.

But if bail be taken by a commissioner in the country, the scient facias may either be sued out into Middlesex, where the recognizance is entered of record, or the county where

taken. Lutw. 1287.

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es 9. But But in C. B. if a recognizance be taken in London at a judge's chambers, and entered on record as taken in London, all the prothonotaries held, that the feire facias ought to be directed to the Sheriffs of London, and not to the Sheriffs of Middlefex. Bro. Abr. fol. 66. b. pl. 85. Although the recognizance is not a perfect record till it is entered upon the roll, yet when it is entered in C. B. it is held, that it is a record from the first acknowledgment, and binds perfons and lands from that time; for it is the acknowledgment before a judge that gives it the force of a record, though the involment be necessary for the testification and perpetuity of it. Hob. 195.

But in Andrews and Harborne, the prothonotaries certified, that upon such recognizance, the scire facias might be brought in Middlesex, or in London. Roll. Abr. 891.

All. 12.

And in Kenny v. Thornton. C. B. Tr. 11 Geo. 3. It was held that a fcire facias on recognizance of bail in London may be there sued, though the bail be enrolled in Middlesex. 2 Blacks. Rep. 768.

And so, in B. R. where bail is taken by commissioners, the scire facias is sued out, either into the county where taken, or into Middlesex, where filed. Att. Prac. 361.

In C. B. plaintiff recovered judgment in an action laid in the county of Surry. The bail had been taken before a judge. After judgment, and ca. fa. returned against the principal: fci. fa. against the bail were brought in Surry, and after two nibils, execution went, and the goods of the bail were taken by fi. fa. On motion and rule to shew cause why the award of execution, and fi. fa. should not be set aside with costs, it being objected that the sci. fa. ought to have been in Middle-sex, and not elsewhere; the caption appearing by the record of the recognizance to be before the Chief Justice, and his brethren in court, as the entry always is of a bail on cepi corpus taken before a judge at chambers. The court held the objection good, and made the rule absolute without costs.

Where the caption of the recognizance appears to be in another county, and is afterwards inrolled in *Middlefex*, (as in some other cases) the sci. fa. may be in either county; but Vol. II.

Of the SCIRE FACIAS against Bail, and of

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the caption appears by the record to be in Middlefex, the sci. fa. must be in Middlesex also; and not elsewhere. A sci. fa. to revive a judgment is the continuance of the suit, and must be brought in that county, where the original action is laid.

A sci. fa. against bail is the first proceeding.

Several of the Filazers, reported the practice to be as the court held it. And that the Filazer by whom the bail-piece is filed, and who enters the record of the recognizance on the roll, makes out the first fa. into Middlesex, or other proper county, as the case requires: the second sci. fa. (when necessary) is signed by the prothonotary. Vide Barnes, 96.

But note, On a recognizance of bail in error, if it be entered to be taken at a judge's chambers in London, the fire

facias must be sued there.

A feire facias against bail, is not amendable. Grey v.

Jefferson. Stra. 1165.

But a feire facias may be quashed, on motion, without costs, before plea pleaded, though defendant has entered an

appearance. Barnes, 431.

If the judgment of an inferior court is removed into B. R. or C. B. by certiorari, and the party sues a scire faciar to have execution, he ought to shew in his scire faciar, that it is the judgment of such an inferior court, removed thither by certiorari; and ought to shew the particular limits of the inferior jurisdiction, and pray execution within the particular limits. But if the judgment be removed into B. R. or C. B. by writ of error, or saise judgment, and affirmed, the party may have execution in any part of England; for by the affirmance it is become the judgment of the superior court. But then in a scire facias upon such a judgment affirmed, the plaintist ought to alledge, that it was removed thither by writ of error, &c. — Vide Guilliam v. Hardy, a Ld. Raym. 216. 3 Salk. 320.

Another reason for abating the scire facias in the above cale was, because it recited the judgment of the inserior court, see per inspectionem recordinabis constat, instead of saying prompatet per recordium. For if defendant were to plead nultid record, it ought to be tried by the record itself, and not pre-

note C. B. if the fair was on a west of attachment, or sold than a sold sold of the fair of a sold sold of the fair of the fai

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Of the Scire FACIAS against Bail, and herein of the TESTE and RETURN of the Writ, &c.

IN B. R. if the fuit was by bill, the ca. fa. taken out against the principal in order to ground proceedings by feire facias against the bail, must have eight days between the teste and return; and must lie four days, exclusive, in the sheriff's

office. Salk. 599.

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So in C. B. and where a ca. fa. against the principal, in order to found a proceeding against the bail, was left with the Sheriff the 6th of Feb. returnable the 9th. The court held it to be a day too foon, and on motion stayed the proceedings against the bail. Barnes, 64.

The ca. fa. against the principal being left in the Sheriff's office, gives notice to the bail, that the plaintiff will proceed against the person, and therefore it is incumbent on the bail to fearch whether any ca. fa. be left in the office. Burr.

Rep. 4 pt. 1360.

A ca. fa. returnable, pending error, is no regular founda-

tion for proceeding against the bail. Barnes, 83.

If by original, it must have fifteen days between the teste and

The scire facias against the bail must not bear teste the

fame day as the ca. fa. against the principal.

Two scire facias's were quashed, the ca. sa. and the first seire facias bearing teste on one and the same day. Barnes,

But the scire facias against the bail may bear teste the very day of the return of the ca. fa. against the principal. Stra.

866. Ld. Raym. 1567.

But a feire facias must not bear teste on a Sunday, for it is

not dies juridicus. Dy. 168. a.

If the suit be by original in B. R. there must be fifteen days between the teste and return of each writ. And the teste and return may be both inclusive. And in this, whether the days shall be exclusive or inclusive, there is no difference between proceedings by bill or original. Stra. 765.

But if the fuit be by bill in B. R. it is sufficient if there are fifteen days between the tefte of the first scire facias and return of the second; as if the first be tested on 24th October, and the second returnable on the 7th November, this is good.

The scire facias must be returnable as the original proceedings are, that is at a day certain or a common return.

Raym. 1417. In C. B. if the fuit was on a writ of attachment, or a bill against a privileged person, fifteen days between the teste and

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Of the SCIRE FACIAS against Bail, and herein of the TESTE and RETURN of the Writ, &c.

return of a scire facias are not requisite; but if by original

aliter, and must be returnable on a general return.

In C. B. in a scire facias against bail, if there be fifteen days between the teste of the first and return of the second scire facias, that is sufficient. Pract. Reg. 377. Rules and orders, 2 vol. 114. Pract. Utr. Banci. 27.

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And in Peale v. Watfon & al. C. B. Mich. 14 Geo. 3. It was held that there must be fifteen days between the teste of the first science, and the return of the second. 2 Blacks.

Rep. 922.

When the fuit in B. R. is by bill, and the two scire facias's are made returnable in fifteen days, as they may—each writ shall have seven days between the teste and return, and not

one ten and the other five. Pract. U. B. 27.

But in *Elliott and Smith*, Stra. 1139. It was held, that if there be fifteen days between the teste of the first, and the return of the second scire facias against bail, it is sufficient, without any regard to the number of the days between the teste and return of each writ.

There were but fourteen days between the teste and return of a scire facias; and the court held it aided by the 17 Car.

2. c. 8. Lutw. 26.

In B. R. when the fuit is by original, the filazer makes,

out the scire facias.

In C. B. the Filazer makes out the first scire facias, and the Prothonotary the second. Barnes, 96.

An alias scire facias must not issue till the first be returna-

ble; and if it do, it is void. Att. Pract. 348.

And the alias must bear teste the day of the return of the first in all cases, except in case of a scire facias quare executionem non on a writ of error, and then it is not necessary. Att. Pract. 248.

If the plaintiff does not wish the bail to be summoned on the first scire facias; but would have a nibil thereto returned, it ought to be delivered to the Sheriff, or left in his office, some time before the return thereof. Reg. 5 Geo. 2.

In Miller and Yarraway, Burr. Rep. 4 pt. 1723. It was faid, that a scire facias against bail must lie in the Sheriffs

office four days at least before the return.

Every alias scire facias must lie four days, exclusive, before the return thereof in the office. Reg. E. 5 G. 2. B. R.

So every scire facias, on which a scire seci is returned, ought to be delivered to the Sheriff, or lest in his office, four days, exclusive, before the return. Ibid.

#### Of the SCIRE FACIAS against Bail, and herein of the TESTE and RETURN of the Writ. &c.

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But, if the party is summoned the day before, or on the day of the return, that is fufficient.

The Sheriff must indorse the time of his receiving it,

A feire facias against bail is not amendable; but the court, on motion, will quash it, if irregular. Stra. 401. 1165.

A scire facias ordered to be quashed, on plaintiff's motion, without costs, before plea pleaded, although the defendant had entered an appearance. Barnes, 431.

The alias scire facias differs in nothing from the first, except in the teste and return; and adding, after the words, "We command you," these words, "as we have before commanded you." are made returnable in filter de

A feire facias is an action, and requires a new warrant of attorney. Ld. Raym. 1048. 1253. 1910 34 37 1911 300

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and that a feire factor against bail must lie in the Sheriff

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so every ine faciar, on which a fire fig is venumed, ough to be delivered to the Sheriff, or left in his office, for day

office that days at least before the return, as here.

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WHEN a non est inventus is returned to the ca. sa. taken out against the principal, the bail are then said to be fixed with the debt and damages recovered, because of the default made by the party; but notwithstanding they are said to be fixed, the court will relieve them, if they come in upon the scire facias against them, and surrender the principal in time.

Bail have ex gratia curia, till the return of the second

feire facias to furrender the principal.

Bail may be relieved by motion, where they cannot plead the matter to the scire facias against them. As where a non est inventus is returned to a ca. sa. the condition of their recognizance being then broken, they cannot plead a render of the principal afterwards; nor would the courts formerly have accepted such render; but they may now, upon render of the body, upon the return of the second scire facias, move the court to stay the proceedings against them.

This indulgence of the courts arose from the great mischief which happened to bail, by a plaintist's taking out a ca. sa. and making it returnable the next day,—so that bail had not time to bring in the body; wherefore the courts indulged the bail so far, as to permit them to render the body upon the return of the first sci. sa. if the ca. sa. was re-

turnable de die in diem. Cro. Car. 618.

But if the ca. fa. was returnable at the next summons, the bail was held strictly to render the principal upon the

return of the ca. fa. and not after. Ibid. 738.

But afterwards the favour was extended, to admit a render any time before the return of the fecond fire facial, or upon the return fedente curia; but afterwards this practice

was difallowed. Moor 850. 3 Buift. 182.

However, it has fince become the practice again both in B. R. and C. B. as appears by 1 Wilf- 270 in B. R. Where the court held, that the bail must render the principal the quarto die of the return of the fecond sci. sa. sedente curia, [and it is not sufficient before a judge at chambers] or they come too late afterwards, even though the same day—and so is the practice in C. B. as appears by Ld. Raym. 156, 7. so that they always admit a render upon the return of the second sci. sa. [i. e. the quarto die post of the return day] sedente curia, or any time before that. But all the admitances of

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these renders are ex gratia curiæ, and not ex merito justitiæ; for the condition of the recognizance is broken by the non-render upon the return of the ca, fa, and therefore these renders cannot be pleaded, but the party must be relieved by motion.

If scire seci is returned to the first scire sacias, the bail may surrender the principal on the appearance day of the return of that scire sacias; that is, if the proceedings are by original; but if they are by bill, the surrender must be on the return day.

Per Cur. of C. B. Bail may surrender the principal before or on the appearance day of the return of the action on the recognizance, where plaintist proceeds that way. If the proceedings against them be by sci. fa. the render may be before or on the appearance day of the return of the first sci. fa. sitting the court, if that be returned scire seci; or it may be before or on the appearance day of the return of the second sci. fa. sitting the court, in case of two nihils returned. Derifly v. Deland. Barnes, 82.

If there be no ca. fa. sued out, returned and filed, it is no ground for a motion to quash the scire facias against the bail; but the bail must plead it, and be discharged by that means.

A ca. sa. may be void as to the principal, and yet well enough to ground a scire facias against the bail; as if a ca. sa. be sued out above a year after judgment, without reviving the judgment by scire facias; for the bail are strangers, and cannot take advantage of that error in a collateral action. 2 Ld. Raym. 1096. 6 Mod. 304. Holt. 90:

A motion was made to stay proceedings against one of the bail, who had been excepted to, and had not justified, but had omitted to get his name struck out of the bail-piece.—
The court denied the motion in its present form, as in the case of Fulk and Birk, 4 Geo. 3. saying, that whilst the name remained upon record, proceedings could not regularly be stayed; but, as in that case, they now gave leave to enter an exoneretur on the bail-piece, nunc pro tunc, on payment of costs. Humpbrey v. Leite, Burr. 4 pt. 2107.

The bail are not liable if the principal dies any time before the return of the ca. fa: and they may plead it to the fair fa:

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But the death of the principal, after the faire facins brought, does not discharge them, if he was alive at the copies returned. Cro. Car. 165. 1 Rol. Abr. 336, Sc.

A motion was made to stay proceedings against bail, because the principal died after a capias ad satisfaciendum returned, but before the return of the second sti. fa. against the bail; but denied, because it was the bails omission, that they did not surrender him, he living till after the return of the ca. fa. 1 Mod. 31. 2 Ld. Raym. 1452. 2 Stra. 717.

Motion to stay proceedings in an action of debt on recognizance of bail, the principal having died after the return of the ca. sa. and before the capias ad respondendum sued out against the bail; but the rule was discharged. The recognizance is absolutely sorfeited immediately after a ca. sa. returned; and if the principal dies afterwards, before a render, the bail are fixed in point of law. Barnes, 106.

Motion to flay proceedings against the bail, the ca. sa. was returnable the last return of Michaelmas, viz. 28th Nov. and the principal died i Dec. the ea. sa. being then in the sherist's office, and not actually returned till the 3d Dec. and the motion was denied. Boyland v. Crooke and others, ball of Porter, B. R. 1748.

But where the principal died after a ca. fa. returned, and before it was filed, the court, on motion, stayed the filing it in favour of the bail. 1 Lill. Abr. 183. Mich. 35 Car. 2. B. R.

A ca. fa. made returnable at a day which falls out of term, would not be void (though liable to be fet afide on motion)—nor can fuch a defect in it be taken advantage of by bal, upon a general demurrer to a feire facias brought against them. Burr. Rep. 4 pt. 1187.

An action was commenced against the bail, and afterwards the plaintiff was obliged to delist therein; and then the bail surrendered the principal before the new action brought, and moved to stay the proceedings; the court held the surrender to be good, it being before the return of the process in this suit, and it was the fault of the plaintiff not to begin right at first. House v. Mingay, one, Sc. Stra. 915.

In an action of affault and battery, the plaintiffs procured a judge's order to hold the defendant to bail for 1401. whereupon the defendant became bound in 2801. and the bail jointly

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and severally in 1401. The plaintiffs had a verdict for 2001. and brought separate actions on the recognizance against the hail. On which the bail moved the court, that on payment of one fum of 140 L and costs, proceedings might be stayed, and compared this to an action on bond. But the plaintiffs infifted, that there was a difference; for in a bond the condition is to pay the money; and if one obligor pays it, then the other is discharged, as the condition is complied with; but, in a recognizance, the condition is not fatisfied till the damages recovered be paid, or the defendant furrendered. And it was held, that the bail being jointly and feverally bound, the actions against them could not be discharged, unless the condition of the recognizance was performed, viz. That the defendant paid what was recovered, or furrendered himself to the Fleet. Calverac and Ux. v. Pinhera, Mich. 12 G. 2. C. P. Barnes, 74. Prast. Reg. G. P. 88.

If an action be brought on a recognizance of bail, the writ must be served four days before the return, and the bail may surrender the principal on the quarto die post of the return sedente curia; but not after the court is risen. Rep. & Cas. of Prass. C. P. 18.

Motion to set aside a fi. fa. against bail, desendant having surrendered in their discharge. It appeared by affidavit, that the second sci. fa. was returnable Gras. Mart. Nov. 12, and the desendant's surrender not before the 15th, the appearance-day of the return. Per cur. The affidavit is desective, as it does not shew that the desendant surrendered science curia on the appearance-day of the return of the second sci. fa. which if he did not, the surrender is out of time. No rule. Barnes, 75.

The bail, for one who was convicted afterwards for a felony, brought up the body by habeas corpus; and the court allowed them to furrender him in discharge of themselves. Stra. 1217.

Debt was brought on the recognizance; plea, no ca. fa. repl. a ca. fa. and demurrer, inde. But the court afterwards, being informed by motion that the defendants had furrendered the principal before the return of the latitat against them, ordered the proceedings to be stayed, and an exoneretur to be entered on the bail-piece, notwithstanding the plea, replication, and demurrer, before the motion. Dodson v. King, Carth. 516.

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H. had a judgment obtained against him, and he rendered himself before the return of the capias, but never gave the plaintiff notice of his render, nor got the bail-piece discharged. The plaintiff proceeded to judgment against the bail on a seire facias, and the court would not reheve them on motion, because no exoneretur was entered, and a seire facias returned, but put them to their andita Querelar Salk. 101.

The allowance of a bankrupt's certificate has no relation back, to discharge his bail, if they are fixed before such al-

lowance. 2 Blacks. Rep. 811. 20 19 3dd lin . north no bil

A creditor who obtains a verdict before commission against a bankrupt, is entitled to prove his costs as well as his debt, under the commission, though judgment was not signed till after the commission issued.—But by proving his debt, and otherwise acting under the commission, he makes his election, and shall not afterwards resort to the bankrupt's bail. Aylest v. Harford and Richards, bail of Lowe. Tr. 19 Geo. 3. C.B. 2 Blacks. Rep. 1317.

But in Let. Come 342, it is held, that ever on the oriners pal judgment is no bait to hinder the faing a ca. /a in order to their geths bail—said to again, "that 1260, Sode as the other cases above are more modern.

A ca. /a. ulated against the principal, and was louged with the bherm for a was reflament, in order to proceed against the mala. After ratio, but alonged, aetendant throught a writ of error addates the wire was spent, plaintiff got a return of the rational proceeded against the bail, which proceeding was different when the court holding, that the ca. /a being returnable a time when the writ of error was depending, was nor a regular foundation for a proceeding against the bail a surier, 8 a.

But work where is a difference in the two courts of K. K. and C. E.

In B. R. a writter error is a supersediar from the time of the blowning, and that is notice of ittelf-or if the party have not

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Of the SCIRE FACIAS against Bail, and herein of relieving them after ERROR brought on the principal Judgment.

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A Writ of error is so absolutely a supersedeas, that the plaintiff cannot so much as take out a ca. sa. and return non est inventus, in order to proceed against the bail. Sweetapple v. Goodsellow. Stra. 867.

The plaintiff, in order to proceed against the bail, took out a ca. sa. on the 3d of December. On the 4th a writ of error was allowed, notwithstanding which he called for a return of non est inventus, and then waiting till the writ of error was at an end, proceeded by scire facias against the bail: and on motion, all the proceedings were set aside: for the ground of them, viz. the return of non est invent. was obtained after notice of the writ of error, which in its nature stopt all proceedings, and the Sheriff could not so much as look after the desendant \*. Stra. 1186. 1 Wils. 16.

Allowance of a writ of error, on a judgment by nil dicit, is so intirely a supersedeas to a subsequent writ of execution, and all proceedings grounded thereon against the bail, that all may be set aside upon motion. Dudley v. Stokes. Hil. 18 Geo. 3. C. B. 2 Blacks. Rep. 1133.

But in Ld. Raym. 342. it is held, that error on the principal judgment is no bar to hinder the fuing a ca. fa. in order to charge the bail—and so again. Ibid. 1260. Sed q. as the other cases above are more modern.

A ca. fa. issued against the principal, and was lodged with the Sheriff for a non est invent. in order to proceed against the bail. After ca. sa. lodged, defendant brought a writ of error; and after the writ was spent, plaintiff got a return of the ca. sa. and proceeded against the bail, which proceeding was discharged: the court holding, that the ca. sa. being returnable at a time when the writ of error was depending, was not a regular soundation for a proceeding against the bail. Barnes, 83.

<sup>\*</sup> But note, there is a difference in the two courts of B. R. and C. B.

In B. R. a writ of error is a fupersedeas from the time of the allowance, and that is notice of itself—or if the party have notice thereof before the allowance, it is even from that notice a supersedeas. Bur. Rep. 4 pt. 340. Say 51.

But in C. B. a writ of error is no fuperfedeas from the fealing, but from the delivery to the clerk of the errors. Barnes, 205. 209.

Of the SCIRE FACIAS against Bail, and herein of relieving them after ERROR brought on the principal Judgment.

The plaintiff recovered judgment, took out a ca. fa. and had a non eff invent. returned. Of the judgment error was brought, and two days after the plaintiff fued out a sci. fa. against the bail, who moved to stay the proceedings therein, [as is done in cases where, pending error, the plaintiff brings debt on the judgment,] insisting that it was more reasonable in this case, because otherwise the bail might lose the advantage of discharging themselves by surrendering the principal, which they can do at any time before the return of the second sci. fa. and the court thought it reasonable that the proceedings should be stayed, on the bail's consenting, that if the judgment be affirmed, they would surrender the principal, or give judgment on the sci. fa. Myer v. Arthur. Stra. 419.

But on a like motion as above, it appearing that bail was not put in upon the writ of error, so as to make an absolute fupersedeas, the court resused to stay the proceedings on the sci. sa. saying they would not go one step farther than the case of Myer v. Arthur. Hunter v. Sampson. Stra. 781.

So where the fecond sci. fa. was returned, and a four-day rule given, on the fourth day of which error being brought on the principal judgment, the bail moved to stay proceedings on the sci. fa. and cited Myer v. Arthur. But, Per cur. that differed, for there the bail came in time whilst they might surrender, which they cannot do here after the return of the second sci. fa. at which time no writ of error was brought. Rule denied. Everett v. Gery. Stra. 443.

And, Per cur. in Richardson v. Jelly. Stra. 1270. Where the bail do not apply to stay the proceedings pending error, till their time to surrender is out, we will not give them any time for that purpose, but only sour days to pay the money

in, after the judgment is affirmed.

The bail in the original action, upon a writ of error brought, are not liable to the costs upon the affirmance of the

judgment.

Though an action of debt on a judgment may be brought, pending a writ of error in the original action, and the court will let the plaintiff proceed to judgment thereon, and only stay execution till the writ of error is determined; yet if an action of debt on the recognizance of bail in the original cause be brought, pending error on the judgment, the court

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Of the SCIRE FACIAS against Bail, and herein of relieving them after ERROR brought on the principal Judgment.

will stay proceedings in such action, without the bail giving judgment; for, by the judgment, the bail would be barred from furrendering the principal. Prac. Reg. C. P. 83.

Barnes, 66. 68.

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The second scire facias was returnable the first day of the term; and a week within term the bail moved to flay the proceedings, on the common terms of giving judgment in the scire facias, and taking four days to furrender after the affirmance of the principal judgment. But the court faid they came too late, after the time to furrender was gone, and would not revive it again; all they would do was, to stay the fuing out execution against them, till after the affirm-Cole v. Buckland, Stra. 872. ance in error.

The plaintiff got judgment on the feire facias against bail, pending error by the principal, and took them in execution; and now they moved to be discharged. Sed per cur. Though you might have applied, and had the proceedings stayed, yet we will not set them aside. If an action of debt had been brought upon the judgment, we should have granted an imparlance, if it had been asked; but we never set aside the judgment when it is once figned; because we take it, that by your not applying in time you have submitted to meet the

plaintiff. Fisher v. Emerton, Stra. 526. After a judgment on sci. fa. against bail, he moved to stay execution, the principal having brought error, and the bail undertaking to pay condemnation money, and the costs on the sei. fa. in four days after affirmance. But in this case, there being no bail on the writ of error, the court made the bail undertake also to pay the costs on the writ of error, in cale the judgment was affirmed; and faid it was a favour they were asking, and they would make them submit to equitable

Ritson v. Francis. Bail of Nash, Stra. 877.

Error was brought in cam. scace. upon a judgment obtained against the defendant in B. R. and writs of scire facias had iffued against the bail in the original action in B. R. where the bail obtained a rule to stay proceedings against them in B. R. upon the fcire facias's, until the writ of error returnable in cam. fcacc. should be determined, they undertaking to pay the debt and damages within four days after affirmance of the judgment, if the same should be affirmed. The judgment was affirmed in cam. scace. and after-

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Of the Scire Facias against Bail, and herein of relieving them after Error brought on the principal Judgment.

wards the original defendant brought error returnable in parliament to reverse the judgment given in cam. scace. on which the bail moved to stay proceedings against them till that writ of error was determined; and though it was objected, that the bail were bound by the express terms in the former rule, the court made the rule absolute, holding, that the word affirmance," in the first rule, must necessarily be understood to mean final affirmance. Kirshaw v. Cartwright and Pearce, bail of Green, Burr. 4 pt. 2819.

Where two writs of the fend illue neturnable in difleent terms, the first must be entered of the term wherein it is returnable; and an award of the second, is sufficient, whom setting it forth at length.

The writs and returns in B. R. if by Hill, must be filed as the Trealury Chamber, or at the King's Bench office, with Mr. Heherden, the figure of the writs.—But if by ariginal, with the Custos Bracinan.

in C. B. they are entered on the Pyttheastery's remem-

Above a fire facion agricult built is not returned, the or facion proceed about an albar fire fac without an of the write of the real. The Raym 822 12821 and the the write that ever ever are hied, the plainfulf

but take on the rule to appare, and force a copy thereof on the bail.

Rule on first facility of C. H. bail Rule on first facility of C. D. of C. D.

the above rule expires in topy days exclusive, but it is not one, and, if the parties do not enter an appending ter, at the expiration thereof tydginent may be figured on the contraction.

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# Of the SCIRE FACIAS against Bail, and herein

If the plaintiff proceeds by scire facias, the usual way is to sue out a scire facias, and get it returned nihil; and then sue out an alias scire facias, and upon a nihil also returned to that, after a rule given, sign judgment on the scire facias. But if the plaintiff would have the parties summoned, either upon the sirst or second sci. fa. the Sheriff will make him out a summons, which he must give to an officer, with instructions for the execution thereof; and, at the return of the writ, the Sheriff will return scire feci; for, in all cases of scire facias against bail, there must be a seire feci returned, or two nihils; for two nihils amount to a warning.

Where two writs of *scire facias* issue returnable in different terms, the first must be entered of the term wherein it is returnable; and an award of the second is sufficient, without setting it forth at length.

The writs and returns in B. R. if by bill, must be filed at the Treasury Chamber, or at the King's Bench office, with Mr. Heberden, the signer of the writs.—But if by original, with the Custos Brevium.

In C. B. they are entered on the Prothonotary's remembrance roll.

Where a fcire facias against bail is not returned, the plaintiff cannot proceed upon an alias sci. fa. without an entry of the first upon the roll. Ld. Raym. 822. 1252.

After the writs and returns thereto are filed, the plaintiff must take out a rule to appear, and serve a copy thereof on the bail.

The above rule expires in four days exclusive, but Sunday is not one; and, if the parties do not enter an appearance, at the expiration thereof judgment may be signed on the scire facias.

But if they enter an appearance in time, the plaintiff must declare in scire facias, and the proceedings to issue or de-

Of the Seins FACTAS against Bail, and herein of declaring, pleading, Judgment, toand Execution, &c.

HE form of a declaration in feire facias is as follows: A low warm and stated to model mit

[Prothonotary's name if in [Chief clerk's name if in C.B. Janob was , and the state of the party and bear to the sale of the sale o wheth the piate of to B. R. have their

Middlefex to wit. Our Lord the king gave in charge to the Sheriff of Middlefex his writ, close in these words, to wit, George the third, &c. [here infert the proceedings, from whether if only one feire facias, exactly as they have beenthereto; or if a scire facias and nihil returned, and then award of an alias scire facias, and scire feci returned thereto, interting the writs and returns.] And the faid E. F. and G. H. at that day having been folemnly demanded, came by Q. R. their attorney, upon which the faid A. B. prays execution to be adjudged to him of the debt and damages (or of the damages, costs and charges, as the action was) aforefaid, according to the force, form, and effect of their faid recognizance, Ge. the defendant pleads, that belief

O. P. for the plaintiff. A. A. Aoos firming on at in 2. R. for the defendant. It was at the principal min

A declaration on a fcire facias, returnable the last return of the term, may be intitled of the same term generally. 3 Will. 154.

A man may plead in abatement, or in bar to a feire facion,

as well as other actions. Lucas, 112.

There are but few pleas in bar which can be pleaded by

bail to a scire facias.

They can plead that no ca. fa. iffued against the principal, or that he died before the return of the ca. fa. or that the plaintiff had other execution.

But they cannot plead, that the principal died before the feire facias issued. Cro. Jac. 163, &c.

But they can plead, that the principal died before any judgment against him; because they cannot have a writ of error to reverse that judgment.

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If the principal furrendered himself, or the bail rendered him [upon or before the return of the ca. sa. or otherwise, such render cannot be pleaded, though upon such render afterwards the court will discharge them on motion. Vide ante.] But such surrender, or render, are not sufficient, unless the plaintiff, or his attorney, have notice thereof; and this is requested, that the plaintiff may, if he pleases, charge him in execution, also that he may not be at any surther trouble or charge against the bail. Lean. 58. 2 Bulst. 260. Moor 883.

Also now by 4 & 5 Ann. c. 16. s. 12. payment of the sum recovered may be pleaded as well to a sci. fa. as to an action of debt.

For other pleas, vide the books.

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Bail pleaded to a feire facias, payment by the principal before the return of the fecond scire facias; and it was resolved the plea was bad, for, in strictness of law, the recognizance was forfeited by suing out the first sci. fa. against the bail. Ld. Raym. 157. But vide the 4 & 5 Ann.

Sci. fa. against the defendant as bail for A. B. C. and D. the defendant pleads, that before the return of the second sci. fa. the plaintiff took A. in execution and still detains him—Demurrer inde. It was argued for the defendant, that the plaintiff having taken one of the principals in execution, had thereby disabled the bail to render him, and therefore discharged him as to all the rest. Sed per cur. The bail have undertaken to bring in all four principals; and therefore though the plaintiff hath taken one, this does not discharge the bail as to the other three, for they ought, as they took upon them, to bring in all four. 2 Lev. 192.

Formerly, if the plaintiff recovered a greater fum than was laid in the action, the bail were not liable. I Salk. 102. But now, where the plaintiff declares for, or recovers a greater fum than is expressed in the process on which he declares, the bail shall not be discharged, but be liable for so much as is sworn to and indorsed on the said process; or for any less sum which the plaintiff in such action shall recover. Pasch. 5 Geo. 2.

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Of the SCIRE PACIAS against Bail, and herein of declaring, pleading, Judgment, and Execution, &c.

The practice of the courts, upon pleading to scire facial, is exactly the same as in other cases; only in the venire, distringuis, or habeas corpora and jurata, for a trial upon the scire facias, after the words, " in a plea of debt, trespass, &c." (as the action may be) add these words, " Where upon a scire facias, &c."

Scire facius against Fane and Barker, bail of Barrell, judgment thereon, and a ca. fa. against Fane only taken out.

Per cur. Though the scire facius was joint, yet the execu-

tion may be feveral.

And note, Though the recognizance be to levy of the lands and thattels, yet execution by the body is good, by the law and usage of this court. 1 Lev. 225. 1 Sid. 339. 2 Keb. 269. 274. 3 Danv. Ab. 307. pl. 2, 4, 5, 6. 2 Sid. 12. 2 Inft. 395. 3 Dan. Abr. 325. G. p. 3. 339. p. 6.

12. 2 Infl. 395. 3 Dan. Abr. 325. G. p. 3. 339. p. 6.
And in Elliott v. Smith. Stra. 1139. It was held, that 1
ca. fa. may be taken out against bail, without any f. fa. or

return of nulla bena previously issued, side sand I

facius against them, matter which lies properly in the mouth of the principal, or might have been pleaded to the feire facius, is not affignable for error, after execution awarded against them. Wraight v. Kitchingham. Stru. 197. Salk. 262. 4 Mod. 306.

A judgment on a feire facius against bail was reversed for

want of a warrant of attorney. Salk 603. Vallegen at shirt

Case was a writ of error, was brought upon the award of execution on a sein sa against bail; and thereupon the record of the judgment against the principal was also returned. It was assigned for error, that the sein sa such and profecuted by J. S. his attorney, but no warrant of attorney entered of record. It was answered that J. S. appears to have been the attorney in the principal cause, and in that to have had a warrant. But the court reversed the judgment; for the record against the principal need not have been certified upon this writ of error; and the suit against the principal was another distinct suit. Therefore there ought to be a particular warrant of attorney for the sei, sa against the bail, and this warrant ought to be entered, not before the writ (for any one may sue out the seize sacias) but upon the return thereof, for then the suit commences. Aswood v. Burr.

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of declaring, pleading, Judgment, and Execution, &c.

A moiety of the damages was levied on one bail; and the other bail not having goods sufficient to levy the remainder, the plaintiff took out a second execution against the goods of the first bail. But, on motion to set aside the second execution, the court held it irregular, for the plaintiff might have levied the whole at first. Barnes, 202.

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If the plaintiff, in a feire faciar, either for want of the damages being previously afcertained, or upon obtaining judgment by default upon the feire faciar, or judgment upon demurrer therein, is of necessity obliged to fue out a feire feri inquiry, in order to afcertain his damages, he must give the like notice of executing the same, as must be given in other cases of trial, and executing writs of inquiry. For which, vide the first vol. under those titles.

Note; A scire facios against bail is not amendable

Rule made absolute to set aside the final judgment against the principal, and all the subsequent proceedings against him and his bail. Three objections were made in points of irregularity; 1st, To the judgment, that it was not figned till about two months after the death of R. the original plaintiff; 2d. To the revival of the judgment by W. the administrator, which was by one fci. fa. only returned nihil, (no new person being called in on defendant's parts) 3d, To the award of execution not docquetted till after defendant had appeared to the fer. fa. As to the fecond and third, the court did not think it necessary to give any opinion, but as to the first they held it to be good. The law abominates cicuity and expence; though the judgment be erroneous in point of fact, yet it may also be deemed arregular ; where the application to let it afide is recent, the bail ought not to be put to an audita querela. The judgment is a mulity of Plaintiff, at the time when it was given, could not come to demand it, and his warrant of attorney was extinct, Whitehead Admor. of Rively v. Gale. by Bail of Stewart. 10 Barnes, 277 ..... Ban

In a feire facios against bail, the plaintiff made a mistake in setting out the recognizance, which the desendant took advantage of, by pleading nul tiel record. And afterwards, the plaintiff moved to amend it, but was denied; for seize facios's against bail are never amended; and the course is, for the plaintiff to quash his own writ. This may be to deseat the bail of an opportunity to surrender, which he

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Of the SCIRE FACIAS against Bail, and herely of declaring, pleading, Judgment, and Exc.

would have done, if he could not have been fure of pro. ceeding in his plea. Grey v. Jefferson. Stra. 1165.

But in the Common Pleas, a feire facias against bail, and all proceedings thereupon, were ordered to be amended by the record in the original action, by inserting the word merchant instead of mercer, being the defendant's addition, even after iffue joined upon nul tiel record. Smeetland v. Beezley and

Browne, Barnes, 4.

Judgment in Middlesex, against the principal. Sci. sa. against the bail in Middlesex, an award of execution, and thereon a si. sa. in Middlesex, and nothing levied. After the year and day, plaintist sued two sei. sa's, to revive the award of execution into London, and after nihils, sued thereon a si. sa. a London and levied these. And on motion, the rule was made absolute to set aside the si. sa. and for restitution. Per cur. The sci. sa. to revive a judgment or award of execution, must be in that county where judgment is recovered or execution awarded. The sci. sa. against bail may be in Middlesex (the second of the recognizance being at Westminster) or in the scounty where the caption of the recognizance appears to be son record if in any other county than Middlesex. Pickering and Us. v. Thompson, Bail of Miller. Barnes, 267.

seine facias upon a judgment obtained against D. to have execution against the bail, who pleaded executio, non, because before the iffuing the first writ of fci. fa. and before the iffuing any writ of ca. fa. against the principal, be died. To which plaintiff replied, that the principal is living at, &c. and traversed, that be died before the issuing forth of the writ of ca. sa. Demurrer inde and joinder, and objected that plaintiff had traversed the death of the principal before the isluing of the faid writ of ca. fa. when there was no fuch writ let forth by Before the issuing of any ca. fq. which is uncertain; therefore the plaintiff in his replication, ought to have fet forth the time when the ca. fa. iffued, and that the Sheriff returned non est inventus; like debt on a bond for performance of covenants an indenture, defendant cannot plead performance generally, without fetting forth the indenture. The replication was adjudged ill, and the court being ready to give judgment, the plaintiff prayed leave to discontinue, which was granted. Carth. 4.

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Of the SCIRE FACIAS to revive a Suit by and against the same Parties.

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THE fecond fort of fcire facias, which is proper to be treated of in this place, is that to revive a judgment formerly had between the parties; and on which no execution was taken out after the rendering such judgment. And this fcire facias to revive a judgment, being a continuance of the fuit, must be brought in that county where the original action was laid. Vide Barnes, 97.

Different opinions have been entertained, whether a feire facias in fuch case lay at common Law? But the doubt, says Lord Coke, arose for want of distinguishing between personal and real actions. 2 Inflit. 409.

At common Law, if after judgment given, or recognizance acknowledged, the plaintiff fued out no execution within the year; the plaintiff, or his conuzee, was driven to an original on the judgment; and the scire facias, in personal actions, was given by West. 2. c. 45. 2 Salk. 600. pl. 8. Sid. 351. 3 Co. 12. 3 Ld. Raym. 669. Co. Lit. 290. b. 4 Mod. 248. Mod. 189.

But in real actions, or upon a fine, though no execution was fued out within a year after the judgment given, or fine levied, yet after the year, a fci. fa. lay for the land, &c. because no new original lay upon the judgment or fine, 2 Instit, 470. And the reason why it lay in this case was, for that in a real action one could have no other advantage of his judgment; but in a personal action he might have debt on his execution against t judgment.

A scire facias lay also in mixed actions as well as real, as in

an affize, writ of annuity, and ejectment.

Therefore, after judgment had in a perfonal action, and no execution fued out within a year, the plaintiff must revive the judgment by feire facias, and have judgment thereon, before he can fue out execution. traveried the death

But if execution were fued out within the year, and returned, and from which the plaintiff had no benefit, there needs no scire facias in such case afterwards, but that execution may be continued down on the roll to any distance of time. And where execution was awarded on a feire facias, and four years after the defendant, being in the Fleet for another cause, was brought into court by habeas corpus, and there admitting himself to be the same person, he was committed in execution without a scire facias. Att. Pract. C. B. 359.

So if there be a ceffet executio for a year, or a writ of error,

no scire facias is necessary.

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Of the Scire Factas to revive a Suit by and against the fame Parties.

But it feems, the ceffet executio should be entered on re. cord. Ibid.

However, if the plaintiff does not take out execution within a year after the ceffet executio is determined, he must within a year and a day, he

first fue out a scire facias.

If execution is stayed by injunction out of Chancery for above a year, the plaintiff must sue out a scire facion. Pran. Reg. C. P. 370. Same in B. R. 1 Stra. 301. Salk. 322.

And a supersedeas quia improvide was awarded to an execution [stayed by an injunction out of Chancery for above a

year ] fued out without a previous fei. fa. de alla taball

But note, An injunction only flays the actual executing the writ; therefore, a plaintiff may fue out his execution, notwithstanding an injunction, and continue it down by vicecomes

Ibid. non mifit breve.

But notwithstanding the rule is, that if no execution be fund out within a year, a scire facias must be sued out to revive the judgment, yet the court of B. R. in the case of Mitchell v. Cue and Ux. Burr. 4 pt. 660. were unanimous, that this rule of reviving a judgment above a year old, by feire facias, before fung out execution upon it, which was intended to prevent a surprize upon the defendant, ought not to be taken advantage of by a defendant, who was to far from being furprized by the plaintiff's delay, that he himself had been trying all manner of methods whereby he might delay the plaintiff, wiz. by injunction, &c. And fo the court not only discharged the rule, [ which had been obtained to let afide the execution] but with costs.

An execution had after a year and day, without a feire facios, is not void, but voidable only. 7 Lev. 404. Salk. 273. pl. 4.

If a defendant brings error, and is nonfuit therein; or if the writ be discontinued, although it be above a year fince the original judgment was given, the plaintiff may take out execution; for though in such cases there is not any new judgment given, yet the bringing of the writ of error revives the hrit judgment.

If the plaintiff, delay the executing a writ of enquiry, till a year after the interlocutory judgment, he cannot do it after without a feire facias. Caf. in B. R. Pafett. 13 W. 3. Haw.

v. Cuton.

But in the case of the king, there need not be any scire saids after the year and day. 2 Salk. 603. pl. 13. Ld. Raym. 328. 553.

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## Of the SCIRE FACIAS to revive a Suit by and against the same Parties.

After a judgment, if the plaintiff within the year sues a scire facias, he cannot after have a capias within the year, till he hath a judgment on the sci. fa. Rol. Abr. 900.

If the plaintiff does not proceed upon the first scire facias, within a year and a day, he cannot afterwards proceed on that writ, but must sue out a new scire facias, for the old writ is discontinued.

If a judgment be above ten years standing, the plaintiff cannot sue out a scire facias, without motion in court. 2 Salk. 598. pl. 3.

If under ten, but above feven years, not without a motion

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But note, If after such motion the judgment is revived by a scire facias, and then the desendant dies before execution, the plaintiff must sue out a new scire facias; and may have it without motion, for the judgment was revived before. 2 Salk. 598.

On a judgment of above twenty years old, the court of C. P. (according to a precedent said to have been settled about nine years before) gave leave to the administrator cum testamento annexo of the plaintiss, to sue out a scire facias to revive the same. But that no execution should be taken out thereon, until either the Sheriss makes an actual return of scire feci, or an assidavit be made and siled of personal notice being served on defendant of the issuing such scire facias. Consgarne & Fly, East. 15 Geo. 3. 2 Blacks. Rep. 995.

If the judgment of an inferior court is removed into B, R. by certiorari, and the party sues a sci. fa. to have execution upon such judgment; he ought to shew in his sci. fa. that it is the judgment of such an inferior court removed thither by certiorari, and ought to shew the particular limits of the inferior jurisdiction, and pray execution within the particular limits. But if the judgment be removed into B. R. by writ of error, and affirmed, the party may have execution in any part of England; for by the affirmance it has become the judgment of the King's Bench. But in a sci. fa. upon such judgment affirmed, the plaintist ought to alledge, that it was removed thither by writ of error. Ld. Raym. 216.

After judgment recovered, Hil. 30, 31 Car. 2. and no execution actually fued out within the year and day, the plaintiff, without a previous fci. fa. in Trin. vac. 5 W. & M. took out an elegit, on which an inquifition was had, and defendant's lands delivered in execution; and then the plaintiff

Of the SCIRE FACIAS to revive a Suit by and against the same Parties.

plaintiff entered on the roll an award of an elegit, of the fame term with the judgment, with continuances of vincomes non mifit breve to the time of fuing out the elegn, And on examination it appearing to have been the practice for many years, the court, confidering the inconveniences that might enfue by opening a gap to destroy many executions, and because the practice had prevailed so long, ordered the execution to stand. Carth. 283. 2 Show. 235. 3 Dane. Abr. 33. s emand sbrewards onw

A foire facias lies not on a judgment pending a writ of error brought on that judgment, but the writ of error pending is a good plea to the fci. fa. Ld. Raym. 1295.

If judgment is against two, the scire facias must be against both; for it is a judicial writ, and must pursue the nature

of the judgment. 2 Salk. 508.

If a joint judgment is obtained against two, and one dies, the scire facias ought to be brought against both the survivor, and the representatives of the deceased defendant.

Vide Carth. 105.

that the indefinent was affigued to him. But if there be a joint judgment against two, and one dies, a feire facias lies against the other alone, reciting the death; and he cannot plead that the heir of him that is dead has affets by descent, and demand judgment if he ought to be charged alone; for at common law, the charge upon a judgment being personal survived; and the stat. of Westim. 2. that gives the elegit, does not take away the remedy of the plaintiff at the common law, and therefore the party may take out his execution which way he pleases, for the words of the stat. are, fit in electione: but, if he should, after the allowance of this writ and revival of the judgment, take out an elegit to charge the lands, the party may have remedy by suggestion, or else by audita querela. Vide Bac. Abr. 3 vol. 698, Sc. 10 But in feire faciar's on writs of attachment.

After interlocutory judgment & the plaintiffs became bankrupts, then took out a writ of inquiry, and proceeded to final judgment in their own names: "(In which judgment, the plaintiffs affignees fued a faire facias to fhew caule why they should not have rexecution: Defendant pleaded the whole matter of the bankruptcy in bar, and prayed judgment if the affignees ought to have execution against him. Demurrer inde and joinder. The court held the affignces properly entitled to the damages; and that the bankrupt's proceeding in their own names, after the inter-

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because the interlocutory judgment, was well enough, because the interlocutory judgment entitled the bankrupts to something, which by the inquest was ascertained. Hewit al. affiguees of Bibbins & al. v. Muntel. 2 Wilf. 372.—
The affiguees might have taken up the cause after the inter-

locutory judgment; a grandout out and and and

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Plaintiff had a judgment, and brought a scire facias, to which the defendant pleaded, and judgment thereon was for the plaintiff, who afterwards became a bankrupt. The commissioners affigned the original judgment to P. who moved the court, that it might be entered to entitle him to the benefit of the judgment on the sci. fa. which was ruled accordingly, without bringing a new sci. fa. Plumer v. Lea. 5 Mod. 88.

A man had judgment in debt, then became a bankrupt, and afterwards fued out execution; and the money being levied and brought into court, the affignee moved that it might not be paid to the plaintiff [the bankrupt] furmifing that the judgment was affigned to him. But the court detained the money till the affignee brought a feire facias to try the bankruptcy—cited in the above case in 2 Wilf. 372.

A scire facias, if against the party, is in hac parte; but if against bail, in ea parte. Salk. 599. Ld. Raym. 393. 532. A scire facias to revive a judgment or award of execution, must be in the county where the judgment is recovered, or

execution awarded. Hob. 4. Cro. Car. 228.

And the feire facias must be returnable at a common return, or at a day certain, as the original proceedings were. Ld. Raym. 1417.

If the proceedings were by original, there must be fifteen days between the teste and return of each scire facias; and

the writs must be returnable on a general return.

But in scire facias's on writs of attachment, or bills against privileged persons in C. B. fifteen days are not requisite be-

tween the teste and return.

And in B. R. if the proceedings were by bill, fifteen days inclusive between the teste of the first and return of the second fel. fa. is sufficient.—But then each writ should have seven days between the teste and return, and not one ten and other five.

Every scire facias wheron nibil is to be returned, should be delivered to the sheriff, or left in his office, some time

before returned. Reg. East. 5 Geo. 2.

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Of the SCIRE FACIAS to revive a Suit by and and againfathe fame Parties niege bas

The alias feire facias must be delivered to the sheriff, or

left in his office, four days before returned. Ibid.

So every feire facias, on which a feire feei is to be returned, ought to be delivered to the theriff, or left in his office. four days exclusive, before the return day. Ibid.

The sheriff must indorse the time of his receiving it. And if the party is fummoned the day before, or on the return day, it is sufficient. Att. Prac. B. R. 347. The

fame in C. B.

In a scire facias to revive a judgment, the term of the n. covery need not be inferted; and faying nuper recuperavit is good. For upon nul tiel record it may be made certainly the record. Barnes, 431.

In B. R. in all cales, there must be two nibils, or one

feire feci returned.

But in C. B. in order to revive a judgment, if both parties are alive, one scire facias, though returned nihil, is

fufficient. Att. Prast. 330.

After the writs and returns are filed, the plaintiff give a rule to appear, which expires in four days; and if m appearance is entered, he may then fign judgment on the cire facias, and take out his execution.

But if the party appears, the plaintiff declares in scire facios; and the practice throughout the subsequent proceed ings, is exactly the fame as in other cases. Of appearing, declaring, pleading, &c. in scire facias, Vide ante under

title fci. fa. against bail.

Where the party has a matter which he might have pleaded to the feire facias in his discharge, and two nibils are returned, and judgment against him, the court will relieve him upon motion, without putting him to an audita queren

Aliter in case a seire secti be returned. Anon. Salk. 93.
In a seire sacias on a judgment, if desendant has a release and omits to plead it, he shall not have an audita querela.

Vide I Will 98.

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Note, Where a scire facias is brought on a judgment in B. R. the plaintiff must shew where the court of B, R, was held, because that court is ambulatory, ubicunque fuerimu in Anglia: but if it be brought on a judgment in C. B'is otherwise, because the court of C. B. is confined to a certain place. 3 Salk. 321, b meshereb ad it bne . Himisly doll lo

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of the Scire Facias to continue a Suit by and against the Representatives of one of the Parties dying BEFORE final Judgment.

BY the 17 Car. 2. r. 8. it is enacted, "That in all actions personal, real, or mixt, the death of either party, between the verdict and the judgment, shall not hereaster be alledged for error, so as such judgment be entered within two terms after such verdict."

And "where any judgment after a werdiet shall be had, by or in the name of any executor or administrator, in such case an administrator de bonis non may sue forth a scire faciar,

and take execution upon fuch judgment."

A fued a sci. sa. against G. as executor of B. on a judgment obtained by the plaintist against the said B. C. pleaded in abatement, that B. died before judgment, Gr. To this G. replied, and set out the stat. 17 Car. z. c. 8. and that B. died after the verdict obtained against him, and after the day of niss prius, and before the day in bank. Thereupon G. demurred. And the objection was, that the plaintist ought to have sued a special seire sacias, and not a general one; for this supposes a judgment against the testator in his hise-time; and the replication shews it was entered after his death, though well entered according to the statute. Sed per cur. The writ is good as it is, and could not be otherwise; for had it been special, there would have been a variance, the judgment being entered generally; and a respondens ousser was awarded. Ld. Raym. 1280.

The death of either party, before the affizes, is not remedied by this statute; but if the party die after the affizes begin, though the trial be after his death, that is within the remedy of the statute; for the affizes is but one day in law. Yet the court faid it was in their discretion, whether they would arrest the judgment. But in Lord Raym. 1415. it was holden not affignable for error, it appearing by the record, that the defendant appeared per at-

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By the 8 & 9 W. 3. c. 11. f. 6. it is enacted, "That in all actions commenced in any court of record, if any plaintiff happen to die after an interlocutory judgment, and before a final judgment obtained therein, the faid action shall not abate by reason thereof, if such action might be originally prosecuted or maintained by the executors or administrators of such plaintiff; and if the defendant die after such interlocutory judgment, and before final judgment therein obtained,

the

Of the SCIRE FACIAS to continue a Suit by and against the Representatives of one of the Parties dying BEFORE final Judgment.

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the faid action shall not abate, if fuch action might be on. ginally profecuted or maintained against the executors or administrators of such defendant: and the plaintiff, or if he he dead, after fuch interlocutory judgment, his executors or administrators shall and may have a scire facias against the defendant, if living after fuch interlocutory judgment; or if he died after, then against his executors or administrators, to hew cause why damages in such action should not be affeffed and recovered by him or them; and if fuch & fendant, his executors or administrators, shall appear at the return of fuch writ, and not shew or alledge any matter fufficient to arrest the final judgment, or being returned warned, or upon two writs of feire facias it be returned that the defendant, his executors or administrators, had nothing whereby to be summoned, or could not be found in the county, shall make default; that thereupon a writ of inquiry of damages shall be awarded, which being executed and returned, judgment final shall be given for the faid plaintiff, his executors or administrators, prosecuting such writ or writs of scire facias, against such defendant, his executors or administrators respectively."

This scire facias to continue a suit, must go into the coun-

try where the action is laid.

The former stat. 17 Car. 2. makes the judgment good, a entered between the parties themselves to the suit, though one died after the verdica, and before the judgment entered.

But by this flat of 8 & 9 W. 3. if a defendant dies after interlocutory judgment, and the action may be continued against his representatives, the final judgment must be against the representatives, for they are expressly taken notice of for that purpose; and the scire facial against them must be spread and appear on the same record. Vide 1 Salk. 42.

If a defendant dies after a writ of inquiry executed, and before the return thereof, it is within this act; and the scire facias against his executor or administrator must be to shew cause, why the damages affessed should not be recovered. Goldsworthy v. Southcot, B. R. I. Will. 243.

The plaintiff, as administrator to f. S. sued a scire facing against the defendant, setting forth, that his intestate sued the defendant as executor in such an action, and had judgment by nil dicit; on which a writ of inquiry was awarded, which

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Of the SCIRE PACIAS to continue a Suit by and against the Representatives of one of the Parties dying Broke final Judgment.

which abated by the intestate's death before the return : that administration was granted the plaintiff, and commanded the Sheriff to fummon the defendant to thew cause, why the plaintiff, as administrator, should not have judgment: to which fci. fa. the executor pleaded a bond of his tellator's, on which judgment had been recovered, and no affets ultra. To which plea plaintiff demurred, and had judgment; for the flatute never intended that the executor should stand in any other circumstances, to make another defence than the party himself might have made against the inquiry; and he could have pleaded nothing but a releafe, or other matter in bar arising puis darrein continuance. He is, by the words of the statute, to shew cause why damages in fuch case shall not be affested and recovered; and if he shall appear at the return, and not flew any matter fufficient to arrest the final judgment, then a writ of inquiry shall be awarded, &c. And arresting judgment is by matter apparent in the record, and not extrinsic; and heretofore they pleaded in arrest of judgment, as now it is moved. And the executor cannot be hurt by this, for the judgment is only de bonis testatoris, as if recovered against the testator himself. Salk. 315.

The defendant died after the rule was out, but before the time given to plead by a judge's order expired; and the plaintiff figned an interlocutory judgment, and fued out a feire facias against the defendant's executor upon this statute, to shew cause why damages should not be affested and recovered; but on motion the court set aside the proceedings for irregularity, as the writ abated by the death of the defendant before interlocutory judgment was signed, notwithstanding the rule to plead was out. And so held in Sibert v. The executor of general Russel, Mich. 9 Geo. 2. Wallop v.

Irwin, 1 Will. 315.

The plaintiff died after verdict, and before judgment entered; afterwards judgment was entered, and execution taken out by his representative without a fer. fa. And on motion to set aside the fi. fa. it was held that, although the judgment was regularly entered by 17 Car. 2. yet the fi. fa. issued irregularly, for there ought to have been a set. fa. So the execution was set aside. Earl v. Brown. B. R. 1 Wilf. 302.

Defendant died, before an interlocutory judgment duly obtained, was figned. His administrator brought a sci. fa.

Of the Scire Factas to continue a Suit by and against the Representatives of one of the Parties, dying BEFORE final Judgment.

and on shewing cause against setting the judgment and subsequent proceedings aside, the court were of opinion, that the roll having been filed before the essign day of Hilary (which was the term next after defendant's death) the judgment was good by relation, though the party was dead before the actual signing; especially as it was only interlocutory, to which no day of signing is required to be set, and discharged the rule to shew cause. Barnes, 266, 267. Vide Ld. Raym: 766. Salk. 37.

Note: The teste and return of such writs of scire facius are according to the action, whether that is by bill or original; and proceedings therein are the same as in other cases of scire facius.

now, to suggest the death of abs. print upon the relligion record, at whatever stage of the last he hied, according to 8 is all 2, c, it. 1.7.

So if there is judgment against A on which a f, f is hed out; but before execution shereof A, dies intestate, there needs no live facas to rea, withis judgment; but execution of the goods under that what of f, fa, may be made in the hands of the administrator; A over w. Breeke For, as the party himself could not have made any defence to the wit of execution, there is no region that his representative

bould be in a better condition.

But if there be judgment in debt agenft two, and one dies in the fariar lies against the other alone, reciting the death, and he cannot plead, that the heir of nim deceased has affects we descent, and demand judgment. In ought to be charged alone; for at common law, the charge upon a judgment, ang personal, survived; and the fer. West. 2 which gives alrestore the plaintist may take our his execution which way he pleases; but if he should, after allowance of this with and trival of judgment, take out an eagen to charge the land, the party may have remedy by suggestion, or by an audita

the an executor brings a fire facial on a judgment, or a second considered, or a second considered and gets a judgment good hat at executioned, and dies intellete, the adminishrator de bomis non mult bring a lar facial upon the original judgment, and cannot proceed to the judgment in the fart ja lar. Vide La Rayas 2049.

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of the Scire Pacias by and against the Representative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

ONE that is no party to the record, recognizance, fine or judgment, as the heir, executor or administrator, though they be privy, and it be within the year, shall have no writ of execution, but a feire facial to enable themselves to the suit; and so of the tenant or defendant, for the alteration of the person altereth the process: otherwise in the case of a statute staple or merchant, because the process is given by other acts of parliament. 2 Infl. 471. Cart. 112. 193. Golb. 83.

But if there be two plaintiffs in a personal action, and one of them dies pending the suit, that shall not put the other to a stire facies; so if one of the desendants die, because the same party still remains on record. 7 Mod. 68. But the way is now, to suggest the death of the party upon the roll, on record, at whatever stage of the suit he died, according to 8 &

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So if there is judgment against A. on which a fi. fa. is suited out; but before execution thereof A. dies intestate, there needs no scire facias to renew this judgment; but execution of the goods under that writ of fi. fa. may be made in the hands of the administrator. Farrer v. Brooks. For, as the party himself could not have made any defence to the writ of execution, there is no reason that his representative

should be in a better condition.

But if there be judgment in debt against two, and one dies, a fire facias lies against the other alone, reciting the death; and he cannot plead, that the heir of him deceased has assets by descent, and demand judgment if he ought to be charged alone; for at common law, the charge upon a judgment, being personal, survived; and the state supon a judgment, being personal, survived; and the state supon law remedy, and therefore the plaintiff may take out his execution which way he pleases; but if he should, after allowance of this writ and revival of judgment, take out an elegit to charge the land, the party may have remedy by suggestion, or by an audita querela. Vide Bac. Abr. 4 vol. 419.

If an executor brings a scire facias on a judgment, or a recognizance, and gets a judgment quod habeat executionem, and dies intestate, the administrator de bonis non must bring a scire facias upon the original judgment, and cannot proceed upon the judgment in the scire facias. Vide Ld. Raym. 1049.

Of the Scire Facias by and against the Representative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

A feire facias by executors upon a judgment obtained by the testator—demurrer inde, and it was insisted, that the practice of this court in such cases is, that the plaintists in the scire facias should insert the profert of letters testamentary [this clause being omitted] and that the writ is not good. To which it was answered, that it was inserted at the end, and that is the practice of B. R.—Per cur. Both forms are good here; but in C. B. this clause is always inserted in the end. Judgment pro quer. Carth. 69.

A feire facias against an administrator, tested 24th October, and returnable the 31st October, alias seire facias tested 31st October, returnable 7th November; and it was objected, that these writs were irregular, because there were not fisten days between the 24th of October and the 7th of November; but adjudged well, there being eight days exclusive between

the teste and return of each writ. Carth. 468.

Note: In B. R. in all cases there must be either two mibile returned to the scire facias's, or a scire feci; but in G. B. in case of the death of the plaintiff one mibil is sufficient. Att. Pras. C. B. 337.

But in case of the death of the defendant there must be

feire feci, or two nibils returned. Ibid.

If a feme, executrix to J. S. marries, and then such hulband and wife bring debt against A. B. on an obligation in the right of the wife as executrix, and have judgment to recover the debt, damages and costs, and then the wife dis before execution sued, the husband cannot have a scire facial upon the judgment; for that he, though he was privy to the judgment, shall not have the thing recovered; but it belongs to the succeeding executor or administrator. Cro. Car. 207. 227. Beaumont v. Long, adjudged, although it was objected, that the judgment was for the cofts and damages which belonged to the husband, though the debt did not; and therefore the scire facias should be for the damages; but a scire facias being as well for the debt as damages, it was held not maintainable; and whether he might maintain a fci. fa. for the damages and costs, they would give no opinion. Jones 248. S. C. adjudged, and faid this recovery does not turn it to the proper debt of the husband, as it would if the baron and feme recovered the proper debt of the feme.

But if husband and wife obtain judgment, and the wife dies, the husband, without taking out administration to her,

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Of the Scire FACIAS by and against the Representative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

may have a fcire facias; for by the judgment it is become a debt to him. Sid. 337. Cro. El. 844. 3 Mod. 188. 2 Leon.

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So if a woman obtains judgment in debt, and after marries, and the hufband and wife fue out a scire facias, and thereupon have an award of execution, though the wife dies, yet the husband [without taking out administration] may have execution upon the judgment, for the award upon the sci. fa. attached in the husband and shall survive, though objected, the award on the sci. fa. made no alteration, as the execution must be on the first judgment. Woodyer v. Gresbam, Salk. 116. pl. 7. and Comb. 455. S. C. by which it appears, that the year expired before the sci. fa. taken out; and said by Holt, ch. just. That the debt was attached to him, jointly with his wife; so that although the award of the execution did not alter the nature of the debt, yet it altered the property. Carth. 415. Skin. 682. pl. 2.

If a judgment in debt is obtained against a feme sole, who afterwards marries, and then a feire facias is thereupon brought against husband and wife; and after two nibils returned, judgment is given, that the plaintiff shall have judgment against them, and then the wife dies, the husband shall be liable to this execution. Carth. 30. Salk. 116. pl. 7.

So note; In the above case of Obrian and Ram, reported also in r Mod. 170. If judgment be against a feme sole, and the marries; and then plaintiff sues out a scire facias against hulband and wife, and has judgment quod habeat executionem, against both, and afterwards the wife dies, plaintiff may sue out a scire facias against the husband, and have judgment thereon against him.

And so vice versa in Woodyer v. Gresham, Salk. 116. If feme fole recovers judgment, and then takes husband, and they both fue out a scire facias, and have judgment quod habeant executionem, and then the dies, the hufband alone may have a

fire facias afterwards, and have execution.

A fire facias was brought against desendant as administratrix of her hulband, on a judgment against him for 1,500 l, and after two ninils returned, a scire sieri inquiry was taken out, and the defendant attended the execution of it, in order to lay the state of the affets before the jury; but the plaintiff infifting, that the award of execution on the former Vol. II.

Of the Scire facias by and against the Representative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

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writs was in point of law an evidence of affets, a devastavit was found to 1,117 l. &c. In Hil. 8 Geo. 2. the appeared to the scire fieri inquiry, pleaded plene administravit, and traversed the devastavit; and notice of trial being given and countermanded, and nothing further done on it, the, in Mich. 10 Geo. 2. moved to have the award of execution fet aside, and to be admitted to plead; it being to no purpose to expect relief upon the trial of the traverse; and cited Salk. 93. 264. to shew, that where there has been no feire feei, and only two kibils, the court will relieve upon motion, and not put the party to an audita querela: and the flate of the real affets was proved to be 130%. which the offered to deliver up, and be examined upon interrogatories, if the plaintiff was diffatisfied with the account. The court was greatly inclined to relieve her; but upon confideration of her long acquiescence, and the several steps taken subsequent to the award of execution, they thought the came too late, and for that reason only refused to interpose. Wharton v. Richardson wid. Stra.

only refused to interpose. Wharton v. Richardson wid. Stra. 1075.

Note: Formerly the method was upon obtaining judgment by default against an executor or administrator (which would reach only the goods of the testator or intestate) and

nulla bona returned to a fi. fa. fued out on fuch judgment, to issue out a writ to inquire, whether the defendant had wasted any of the effects of the deceased; and if a devastavit was found by the inquilition and returned thereto, then for the plaintiff to proceed by scire facias for the defendant to shew cause why the plaintiff should not have judgment de bonis propriis; to which scire facias the executor or administrator could appear and plead plene administravit [as in the case above].-But now the fieri facias inquiry, and the fire facias are incorporated, and made out in one writ for expedition. However this method, though much better than the old one, is feldom pursued at this day, as it does not answer to the plaintiff if the debt is but a small one, because no costs are allowed against the executor or administrator, unless they appear and plead to the fcire facias, and it be found against them. But the way is to bring an action of debt on the

judgment, suggesting a devastavit.

A. recovered judgment in B. R. by nil dicit against B. B. brought error thereon in cam. scace, which was still depending.

After-

Of the Scire Facias by and against the Representative of a Party to the Suit, dying AFTER Judgment, and BEFORE Execution.

Afterwards A. became bankrupt; and the judgment was affigned by the commissioners to the affignees, who sued out as affignees two scire facias's in B. R. on the judgment, and on two nihils, had judgment, and took the defendant's goods in execution on a fi. fa. On which B. moved, that the judgment on the fci. fa. might be set aside as irregular, and have restitution, the writ of error being still depending: On reference to the master, he reported as above, with this addition, that A. died after the writ of error brought, and after in nullo est erratum pleaded.—And the court held, first, that the writ of error was not abated, by the death of the defendant in error, after in nullo est erratum pleaded; secondly, that a scire facias don't lie on a judgment pending error brought thereon; but that error pending is a good plea to such scire facias. So that the scire facias was not regular. But then the Judges made a question, whether they should set the judgment on the scire facias aside on motion, and the execution fued thereon, or should drive the defendant to an audita querela: but on confideration they all held, the whole proceedings irregular, and fet them aside on motion. Assignees of Kiffin v. Lennard, Ld. Raym. 1295.

Plaintiff's testator obtained judgment, which after his death was revived by two scire facias's, with nihils returned; and desendant being taken in execution, moved to be discharged, upon producing a release from the testator. On shewing cause, it appeared doubtful whether the release was executed by the testator; and thereupon it was insisted, that though when the scire facias is not served, the court will in a clear case relieve the party upon motion, and not put him to his audita querela; yet they will never do it where the fact is disputed. And so the court agreed; but then they would have had the plaintiff's consent to try it in a seigned issue, the desendant lying actually in execution; which the plaintiff, who was an Executor in trust, resusing to consent to, the court resused to do any thing upon motion, and left the desendant to his audita querela. Mitsord Exer. v. Lordwell.

Stra. 1198.

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TTORNIES have privilege not to be fued in any other courts except those in which they are fworn and admitted, because of the prejudice that may accrue to the bulinels of those courts in which their attendance is required; neither are they to be held to special bail, because they are obliged to attend, and therefore are prefumed to be always amenable: also, as officers of the court, they are entitled to the process of attachment, and may sue by attachment

But this privilege an attorney shall not have at the King's 2 Rol. Abr. 274. Bro. Superfedeas 1. 9 Hen. 6.44.

Nor unless there be the same remedy in his own court; therefore he shall not have his privilege when money is attached in his hands by foreign attachment in the Sheriff's courts in London, Saund. 67. Vide Comb. 427.

Nor in an action real against an attorney of the King's

Bench. Saund. 67.

Nor in appeal against an attorney of the Common Pleas.

Saund. 67. Nor when he fues, or is fued in auter droit, as executor or administrator. 12 Med. 316. Ld. Raym. 533. Hob. 117.

Salk. 2. pl. 4. But if an attorney, executor or administrator is sued by bill of privilege, he cannot object after appearance, for the fault is cured by appearance. Barnes, 167. Sed q. if shewn for

cause of demurrer,

Nor where an attorney of one court fues another of another court, the defendant shall not plead his privilege; for the attendance of the plaintiff is as necessary in his court, as the defendant's is in his; and therefore, the cause is lerally attached in the court where the plaintiff is an officer, Rol. Abr. 275. Moor, 556. 2 Med. 298. 2 Lev. 129

But quære, as to this, for it feems, the defendant attorney must be sued by bill, although the plaintiff is an attorney; and therefore he must be fued in his own court.

Stra. 1141.

Nor when he joins, or is joined, in the fame action with

Vent. 298. Dyer 277. Godb. 10.

One attorney fued another attorney of the same court by attachment of privilege, and on motion the proceedings

were stayed. Barnes, 44.

An action on a penal statute, viz. 13 El. for entering 2 fraudulent judgment against an attorney of C. B. was commenced by original; on which he moved to stay proceedings,

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insisting he ought to be sued by bill. On shewing cause, it was urged, that this was a prosecution for the crown: and that desendant, if entitled to privilege, may plead it, Sed per cur. These qui tam actions are never considered as the king's causes. In prosecutions at the suit of the crown, desendants, though acquitted, can have no costs; but in actions qui tam it is otherwise. The proceeding by original is irregular. Rule absolute to stay proceedings. Britton qui tam v. Teasdale, Barnes, 48.

An attorney has privilege to keep the venue in Middleser when he is plaintiff, but not to change it thither when he is defendant. Burr. Rep. 4 pt. 2027. 2032. But contra in 2 Vent. 47. and vide I Salk. 668. If an attorney, being plaintiff, lay his action in Middlesex, the venue shall not be changed; otherwise if in London.

An attorney has no privilege against the court of conscience in London. Burr. Rep. 4 pt. 1583.

An attorney, being executor or administrator, shall not sue or be sued as a privileged person, I Ld. Raym. 533.

An attorney may have his privilege in fuing a member of the university. Ld. Raym. 342.

If an attorney absent himself for a year together, and does not give his attendance, he loses his privilege. Sed vide, Latw. 1667. where it is said, that he shall have his privilege, so long as he continues an attorney on record, though he do not practise.

But by Burr. Rep. 4 pt. 2113. 2116. Privilege continues-

no longer than he remains an acting attorney.

Anciently rolls were kept of attornies in B. R. but fince the flamp acts the rolls have been disused, and a book stamped hath been kept, and the attornies names entered therein. Stra. 77. But in C. B. there is a regular record kept of the attornies. Ibid.

The privilege of an attorney is the privilege of the court he belongs to, and not his own personal privilege; and he may wave it. Burr. 4 pt. 2113, that is, when he is plaintiff.

But an attorney cannot waive his privilege of being sued by bill. And one having cause of action against him, however small, may sue him in the superior court, instead of suing him in an inferior. Gardner v, Jessop, one, &c. in G. B. 2 Wils. 42.

Defendant, an attorney of C. B. was fued in B. R. by bill of privilege; plaintiff, supposing him an attorney of that court, judgment went by default, and plaintiff staid two

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terms in hopes of receiving his debt, and then gave notice of executing a writ of enquiry, whereupon defendant moved to fet alide the proceedings as irregular. But the court, on thewing cause, discharged the rule, and held, that by lying by so long, he had waived his privilege. Hern. v. Howard, 3 Blacks. Rep. 231.

An attorney must be sued by bill, though the plaintiff be also an attorney; and he cannot take out an attachment and hold the defendant to bail, as he does in the case of common persons; therefore this case is an exception out of the rule, that privilege takes away privilege. Ratcliffe one, &c. v.

Befley. Stra. 1141.

Attornies must sue each other by bill, as well when they

If the plaintiff is attorney of B. R. and defendant is so likewise, privilege will be allowed. Secus if plaintiff belongs to C. B. and defendant to B. R. for defendant is not supposed to be present in C. B. as he is in B. R. Shorter v. Parkhouse. B. R. Bast. 20 Geo. 2. 1 Blacks. Rep. 18. And in Danser v. Berryman. C. B. Mich. 20 Geo. 3. where an attorney of one court fues an attorney of another, the privilege of that court which is possessed of the cause shall be preferred. 2 Blacks. Rep. 1325.

But an attorney of C. B. may, for a debt bona fide paid,

fue an attorney of B. R. by attachment, and he shall not be

entitled to privilege. Barnes, 44.

Pending a foregudger obtained against defendant by another person, plaintiff sued him by bill, as having privilege of an attorney. Defendant moved to fet aside the second foregudger, infilting that his privilege was suspended by the first; and plaintiff ought to have fued him by original, in the common way. On thewing cause, rule made absolute without opposition, Vincent v. Willoughly. Barnes, 43:

One attorney of C. B. fued another attorney of C. B. by capies; and the defendant moved to stay the proceedings, infishing he ought to be sued by bill. It appeared that the defendant had obtained a judge's order for time to put in bail; but this was held not to be a sufficient waiver of his objection to the plaintiff's method of proceeding against him, and the rule was made absolute to stay proceedings with costs,

An attorney having been arrested, was bailed; and another action being brought against him in the same court, he pleaded his privilege; and it was adjudged, that putting

in bail to the first action did not discharge his privilege.

Carth. 377.

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An attorney of C. B. was arrested at the fuit of an attorney of B. R. and gave bail; and then B. delivered a de-claration by the by against him, as in custody of the marshal, to which he pleaded his privilege; and resolved, that though he be in custody of the marshal, at the suit of A. yet when A. declares against him, he may plead his privibge, because he comes here by coercion, and had no opportunity before to take advantage of it. 2. That although he files bail at the fuit of A. and in the fame term a declaration is delivered against him at the fuit of B. yet the defendant may plead his privilege against B. as well as against A. for it were absurd, that B. who tops his suit upon the action of A. should have more liberty or advantage fendant waives his privilege in the first action, he is then obnoxious to the fuits of every body, notwithstanding his privilege. 3. That if after the defendant has waived his privilege, he shall yet plead it, the plaintiff in his replication must shew the defendant's waiver, and rely upon the estoppel. Ld. Raym. 135, Vide Wilf. Rep. B. R. 306. Salk. 1.

Declaration by bill of Middlesex against an attorney of B. R. as acceptor of a bill of Exchange drawn upon him, according to the custom of merchants; to which defendant pleaded in abatement, that he was, and still is, an attorney of B. R. and ought to have been sued there by bill of privilege as an attorney, and not by bill of Middlesex. Demurrer inde and joinder. Per. cur. He must have his privilege, Judgment for defendant. Cornforth v. Price. Hilary, 20 Geo. 3.

B. R.

An attorney has privilege in a qui tam action commenced against him. Barnes, 48. Att. Prac. 54. Skin. 549.

If an attorney sue by original, he has no privilege, and cannot sue in propria persona. 2 Lev. 39. 2 Stra. 837.

Barnes, 479.

It is said, that a bill cannot be filed against an attorney in vacation. 2 Barnes, 34. 36. Har. Pract. 360. But it has been done in many cases, to save the statute of limitations.

A motion was made, that an attorney, who was going to Ireland, might put in special bail, and denied. 1 Mod. 10.

If an attorney is arrested, it is a motion of course, to discharge on common bail; I Will. 292. that is, an attor-

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ney of the same court. But if an attorney of C. B. is arrested by process of B. R. he must plead his privilege, and cannot be discharged on common bail. Stra. 864.

306.

An attorney of B. R. arrested by capias on a special original out of the same court, is not entitled to his discharge by ferving the theriff with a writ of privilege, but must plead it fub pede figilli. Held by C. P in an action by attorney for falle imprisonment, against the sheriff, Cropley v. Shaw. Eaft. 16 Geo. 3. 2 Blackf. Rep. 1085.

If an attorney of C. B. be actually in the custody of the marshal, he shall only be sued in B. R. 1 Stra. 191, and cannot plead his privilege; 2 Roll, Abr. 232. for there is a great difference between an actual and a supposed custody.

1 Saik. 1.

In an action against baron and feme, if the husband be an attorney, he cannot appear in person, and put in bail for his wife, but he ought to put in bail for himself and his wife; for he shall not have privilege in an action against him and

his wife, 1 Roll, 380, c. 45.

By 12 Geo. 2. 2. 13. f. 9. it is enacted, " That no attorney or folicitor, who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall, during his confinement in any goal or prifon, or within the limits, rules, or liberties of any gaol or prison, in his own name, or in the name of any other attorney or folicitor, fue out any writ or process, or commence or profecute any action or fuit, in any courts of law or equity, under pain of being struck off the roll and incapaciated, &c.

This statute only disqualifying attornies who are prifoners, relates only to profecuting, and not to defending

fuits. Barnes, 263.

An attorney, prisoner, commencing an action on a bailbond, affigned after his imprisonment, in an action begun before, is not within this statute, it being a continuance of

the former fuit.

Attornies, in case of misbehaviour or mal practice, are fubject to the animadversion and censure of the court in which they are admitted by a furmary application, by way of motion thereto; and will be firuck off the rolls, imprifoned, or otherwise punished, at the discretion of the court; and the process sued out, on such occasions, to bring them into court, is an attachment; and being issued at the suit of

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An attorney cannot be lesse in ejectment. Mich. 1654. Nor bail in any action depending in the court of which he is an attorney. Ibid. But an attorney house-keeper is often bail, though contrary to the above rule. 8 Mod. 338.

Attorney cannot be commissioner to take bail. Stat. 4. W.

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of he Attorney or not, must be tried by the record. And yet, when an attorney pleads his privilege, he has no occasion to say, prout patet per recordum, or to produce his writ of privilege. And per Holt ch. just. There are two ways of pleading his privilege so as it cannot be denied, viz.—with a profert of a writ of privilege, or an exemplification of the record of his admission of attorney. But he may plead his privilege only. Vide Ld. Raym. 1173.

If an attorney sues in right of his wife, and joins her in the action, he cannot sue by writ of privilege. Ld. Raym. 1398.

No advantage can be taken of an erroneous writ of privilege (on error brought) upon the bare recital in the record; but the writ itself ought to be before the court by certiorari, Ld, Raym, 1398,

prilon, or within the limits, rules, or liberties of any gall or prilon, thall, during his confinement in any goal or prilation, unwithin the limits, rules, for liberties of any gall or prilon, in his own name, or in the name of any other attorney or tolicitor, fue out any writ or process, or commence or profecuse any action or mut, in any courts of law or equire, under pain of though the off the roll and incape to pour, of the coll and incape to pour, of.

Jones , relates only disqualifying attorness who are prisoner, relates only to professing, and not to defending faits. Empey, 263.

bond, adigned after his imprisonment, in an aftion begun betore, is not within this statute, it being a continuance of the correction.

Artenues, in case of missansiour or mas practice, are subject to the animadvention and censure of the court in which they are admitted by a summary application, by way of motion thereto, and will be thack of the rolls, impri-

car about the real state of the country of the country of the country and the country are access that a bring the at any one that occasions, to bring the at

A N attorney plaintiff may fue by attachment of privilege, which is in the nature of an original writ, and is to the following effect: the 4th fact of 12 Car 2 Pat 2. c

GEORGE the third, &c. To the fheriff of Middlefex, greeting. We command you, that you attach C. D. and E. P. [any number of defendants may be put in this writ] if they may be found in your bailiwick, and them fafely deep, so that you may have their bodies before us at West. minfler, on to 10 MM VAS next after die certain in term, if in B. R. and not a general return day] to answer A. B. gentleman, being one of the attornies of our court, before us, according to the liberties and privileges of fuch attornies and other ministers of the fame to court, from time whereof the memory of man is not to the contrary used and approved in the same court of a plea of trespals, [or whatever the action is] and have there or unimiters storedays. That this writ. " perion or perions, taken in the enty writ of confas arloya-

# Withels, &c. roth lower his wird with the to two man "

" and received for the larne; end-that, upon the faid wrice If the attachment requires only a common appearance, a copy must be served, with notice as in other cases.—If the party is to be held to bail, the fum fworn to must be marked on the back of the writ, and also the day it is sued out.

In B. R. an attachment of privilege is but as a latitat, and

not as an original. 1 Show. 367.

But it has been faid, that an attachment of privilege in C. B. is not like an original writ, and therefore plaintiff may put several defendants into one attachment, and declare against them severally. King's Rep. 38.

In another case held, that an attachment of privilege in C. B. is in the nature of an original writ; and when it is replied to f

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In C. B. the attachment must have fifteen days between the teste and return. Barnes, 410. And the pracipe for a writ of attachment of privilege in C. B. must be left with the prothonotary, according to the rule. Hilary, 11 Geo. 2. f. 2. And if it iffues without, on motion it will be quashed, with costs, Frogatt v. Tapscott. 2 Blacks. Rep. 919. An attachment of privilege is amendable, though it is in the nature of an original writ, as if there are not fifteen days between the teste and return, me who fued out the lame is to enter title the Vill to

to fave the flatute of limitations, it is sufficient to shew the teste without continuances, till the declaration. Finch v.

Wilson, one, &c. of C. B. in error. I Wilf. 167.

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By the 4th fect. of 13 Car. 2. stat. 2. c. 2. [the statute which occasioned the insertion of the ac etiam clause in process to arrest and hold to special bail it is provided, That the faid act, nor any clause or thing herein before specified or contained, shall not extend, nor be construed " or taken to extend, unto any arrests hereafter to be " made, upon or by virtue of any writ of capias utlagatum, " attachment upon rescues, or attachment upon any contempt, or of any attachment of privilege, at the fuit of any " privileged person, or of any other attachment for con-" tempt whatfoever, issuing or to be issuing out of either of " the faid courts, although there be no particular certainty of " the cause of action expressed or contained in the said writs; but that nevertheless, no theriff or under-theriff, nor any of the officers or ministers aforefaid, shall discharge any " person or persons, taken upon any writ of capias utlaga-" tum, out of custody, without a lawful supersedeas first had " and received for the same; and that, upon the said writs " of attachment, such lawful course be taken for security "for appearance therein as hath been heretofore used; " any thing herein before expressed to the contrary thereof, " in any wife notwithstanding."

By this clause it should seem, that there is no occasion for an "ac etiam" clause in an attachment of privilege to hold desendant to bail, at the suit of an attorney, though such clause is usually inserted, if the party is to be held to special

bail, Vide 2 Wilf. 392.

In B. R..

By Reg. H. 20 Geo. 2.

Eyery attorney of this court, who shall fue out any attachment of privilege against any defendant, shall leave a pracipe with the figner of the writs, with the defendants names, not exceeding four in each writ, with the return and day of figning such writ, with the agent's or attorney's

name who fued out the same.

In C. 13.

By Reg. H. 11 G. 2. You must make out a pracipe, containing the plaintists and defendants names, not exceeding four in the whole, with the return of the writ, day of signing, and the agent's or attorney's name, who sues out the same: this pracipe you must leave with the prothonotary, who, without see or reward, is to enter the same on a re-

In 18. 18 And all such pracipes shall be entered on the roll, where the pracipes of latitat, and all other writs ifluing out of this court, are entered; and the officer who figns the writs in this court shall not fign such attachment, till a pracipe be left with him for that purpose.

In B. R. you pay nothing for figning the writ; but for fealing it, 7d. to the fealer. Rich. Att. Pract. B. R. 410.

The form of the pracipe to be left with the figner of the writs, is as follows:

Surry. Attachment of privilege for A. B. gentleman, one of the attornies, &c. againft C. D. Debt.

Returned Wednesday next after the marrow of All Souls.

O. P. agent 21 Nov. 1779.

### Affidavit for 50 %.

If the attachment in B. R. requires only a common appearance, a copy thereof is ferved with an English notice, in writing, fubscribed as in other cases, and the appearance must be entered with the clerk of the common bails.

If it requires special bail a judge's clerk takes the recognizance as in other cases.

In C. 23. membrance roll, to be kept in his office for that purpole; and he is not to fign any attachment of privilege, unless fuch pracipe be left in his office at the time of finging After judginent, by defend

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In C. B. you pay nothing to the prothonotary for figning the writ, and only one penny for the seal. Rich. Att. Pras. C. B. 258.

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Like pracipe in this court, to be left with the prothonotary.

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Middlefex to wit, A. B. ge

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'in B. R. 18 this

lord the king, of privileg If the attachment in C. B. requires only common bail, after a copy thereof ferved, with an English notice in writing, fubfcribed as in other cases, the appearance must be entered with the prothonotary: but if it requires special bail, the clerk of the docquets prepares the bail-piece or recognizance, and attends a judge,

or the court, where the same is entered into, and the bail justify, or fresh bail is added, in the same manner as the Filazer does on mesne process by original.

After judgment, by default on common process, plaintiff may sue out a special original to warrant it in case error should be brought. But an attorney has no need to sue out a new attachment of privilege to warrant his judgment. For where judgment was obtained against one defendant, on a joint attachment, of privilege against him and others, and he brought error, the court said (upon denying leave to take out a separate attachment to warrant a judgment) that by the practice of C. P. the old joint attachment seemed to be good and sufficient to warrant proceedings thereon against defendants, severally, as would be reported to the King's Bench, if they desired to be informed what was the practice in C. P. Vide Barnes, 423.

The beginning of a declaration, at the suit of an attorney

in B. R. is thus:

Middlefex, to wit, A. B. gent. one of the attornies of the court of our lord the king, before the king himself, complains against C. D. being in the custody of the marshal of the Marshalsea, &c. [as in other declarations

add pledges.

In C. B. it is in this form:

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his office for that purpole;

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tachment of privilege, unlets fuch practice be left in his

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Middlesex. C. D. late of, &c. was attached by a writ of our lord the king, of privilege issuing out of our court here, to answer A. B. gent. one of the attornies of the court of our lord the king of the Bench here, according to the liberties and privileges of the same court; for such attornies and other ministers of the same Bench, time out of mind, used and approved of in the same in a plea of trespass on the case, &c. and thereupon the said A. in his proper persons, complains, &c.

es. speed bbs o curous both but if it requires special buil.

The subsequent proceedings, at the suit of an attorney, are the same as in other cases.

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If an attorney delivers his declaration four days exclusive, before the end of the term, the defendant must plead as of that term.

If an attorney delivers his declaration four days exclusive, before the end of the term in which the attachment was returnable, and enters a rule to plead, and demands a plea, the defendant shall be obliged to plead as of that term; and if he does not deliver his declaration in that time, the defendant is entitled to an imparlance:

And if he does not deliver his declaration before the effoign day of the subsequent term, the defendant may have an

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### Of Proceeding against an Attorney DEFEN-DANT in the KING'S BENCH.

A N attorney of the King's Bench must be sued by bill, and cannot be arrested; and the method of suing him is this, The plaintiff files a bill against him, [which is a direct copy of a declaration engroffed on a flip of parchment stamped with atreble penny stamp] with the clerk of the declarations in the King's Bench office, and then makes a copy thereof on treble penny stampt paper, for the declaration, which must be delivered to him with notice thereon to plead; and then the plaintiff proceeds as in other cases.

A bill against an attorney is in the following form:

Middlesex to wit. A. B. complains against C. D. gent. one of the attornies of the court of our lord the king, before the king himself, present here in court in his own proper person; for that Whereas, &c. [as in other cases] and therefore he prays relief, &c.

0. P. for the plaintiff. The defendant in person.

John Doe, Pledges of profecuting.

Upon delivery of this declaration, and a rule given to plead thereto, [either a four or eight day rule] and the fame being expired, the plaintiff may fign judgment; so that in the King's Bench the remedy against attornies is speedier than in the Common Pleas, which vide the next page; and also speedier than against other indifferent persons, as the bill and declaration are one and the same thing, and the first commencement of the fuit.

In B. R. if the action be laid in London or Middlesex; and the defendant attorney lives within twenty miles of London, upon a rule given to plead, he has four days time to plead; and if he resides above twenty miles from London, or the action be laid in any other county than Middlesex or London, he has

eight days time to plead.

The bill against an attorney concluded, and thereof he brings fuit instead of, and thereof he prays relief; and on mo-tion to amend, the court of C. P. granted the amendment.

Barnes, 3.

Q£

Of Proceeding against an Attorney DEFEN. DANT in the COMMON PLEAS.

N attorney of the Common Pleas also must be fued by bill, and cannot be arrested; but the bill and declaration against an attorney are different in this court; for by Reg. Trin. 21 Car. 2. " No bill thall be filed against an officer, attorney, clerk or minister of the court, in order to a fore. judger, until the bill be actually entered on record, and a num. ber-roll actually put to the bill."

The above rule however is in a great measure disused, and the method of proceeding at this day against an attorney de-

fendant is as follows:

The plaintiff engrolles bis bill on a flip of parchment stamped with a double penny stamp, and carries it to the Prothonotary, who marks it as entered, on being paid for the entry, and it is thereby supposed to be entered, though no number-roll is put on the bill; which being done, the bill must be carried to Westminster-ball, and given to one of the criers of the court, who calls the defendant in court, for which he is paid 1 s. and by 2 vol. Rules and Orders, he must be called three times in court. After which the plaintiff gives a rule on the bill, with the secondary, for the defendant to appear, for which is paid 1 s. 4d. viz. 1 s. duty, and 4d. the rule; and then the bill is filed in the Prothonotary's office, for which is paid 4 d. upon filing which bill, notice thereof must be given to the defendant, in writing, by Reg. Hill. 11 Geo. 2. whereby it is ordered, that

"Where a bill shall be filed against an attorney of the court, no forejudger shall be entered for want of appearance, if the action be laid in London or Middlesex, and the attorna refides within twenty miles of London, until four days after notice in writing of filing such bill be given to such attorney, of his agent, or left at his usual place of abode, and a rule given for fuch appearance as usual; and if such attorney resides above twenty miles from London, or the action be in any other county than London or Middlefex, no forejudger shall be entered till eight days after such notice shall be given, in manner as aforefaid, and a rule to appear; the faid days, to be exclusive

of the days of giving fuch notice." that agoda adv aranged

The notice of a bill being filed.

Common Pleas.

A. B. create his a box and and evaper flatering at against

the following forms, beginning with as a C. D. gentleman, one of the attornies, &c.

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### Of Proceeding against an Attorney DEFEN-DANT in the COMMON PLEAS.

Take notice, that a bill was this day filed in the Prothonotary's office of his Majesty's court of Common Pleas at Westminster, against you the defendant C. D. at the suit of the plaintist A. B. in an action of trespass upon the case upon several promises [or whatever it is] and unless you appear to the said bill on Wednesday the twenty-sixth day of January instant, you will be forejudged the court.

23d January, 1780.

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O. P. attorney for the plaintiff.

To C. D. the defendant.

The above is the notice given by the secondary's rule of the bill being filed, the notice to plead is as follows:

Common Pleas.

A. B. against C. D.

Take notice, that there is left in the Prothonotary's office, in the Inner Temple, London, a declaration against you the defendant, at the suit of the plaintiff A. B. in an action upon the case upon several promises [whatever the case is] which the plaintiff lays to his damage of 1001, and unless you plead to the said declaration within four days next after the first day of next Hilary term, judgment will be entered against you by default.

O. P. attorney for the plaintiff.

#### To G. D. defendant.

Before the above rule for giving the defendant notice, the plaintiff did nothing more than have him called by the cryer in court, which was then thought sufficient, as all attornies were supposed to be personally present during the sitting of the court; but many of the attornies having been struck off the roll on forejudgers, for want of other notice; and many living at a distance, so that it was impossible to give orders for an appearance in time before the expiration of the rules to appear, the above rule became necessary.

If the defendant appears in time, you deliver a declaration, and proceed as in other cases; but if he does not appear, he must be forejudged, that is, struck off the roll; to effect which the plaintiff enters his bill, and a forejudger, on the roll, in the following form, beginning with a memorandum, as in

fuits by bill in B. R.

Vol. II.

K.

Middlefex,

#### Of Proceeding against an Attorney DEFEN-DANT in the COMMON PLEAS.

Middlesex, to wit. Be it remembered, that on the day of in this same term, A. B. came here into court by O. P. his attorney, and exhibited to the justices of our lord the now king of the bench here, his bill against C. D. gentleman, one of the attornies of the court of our said lord the now king, of the bench here present, here in court in his proper person, in a plea of trespass on the case; the tenor of which said bill followeth in these words, (to wit) To the justices of our lord the king, of the bench. Middlesex, to wit. A. B. by O. P. his attorney, complaineth of C. D. gentleman, &c. [the whole bill to] and thereupon he prayeth relief, &c.

Pledges for profecuting, { John Doe and Richard Ros.

Whereupon the faid C. D. being folemnly called, came not, therefore he ftandeth forejudged from exercifing his office of attorney of this court for his contumacy, &c.

You pay the Prothonotary 2s. for figning the forejudger, and the clerk of the warrant 1s. 4d. for striking the defendant off the roll, and then you may proceed against him as

against a common person.

When once an attorney is forejudged, the fuit by bill is at an end, and the plaintiff, if he proceeds, must proceed as against an indifferent person, by original and capias, in the common way. Barnes, 43. and so must every other person who sues him.

Defendant being sued as an attorney of C. P. by bill, pleaded in abatement that he is not an attorney. Plaintiff moved to set aside the plea, and had a rule to shew cause; but it appearing, on shewing cause by certificate from the clerk of the warrants, that defendant was forejudged sive years ago, and that that forejudger still remains in sorce, the rule was discharged. Per cur. defendant is totally deprived of privilege, pending a forejudger; plaintiff may reply as he pleases, and traverse the sact, which is triable by the record, or demur, if he thinks the plea bad. The plea is sworn to be true, and seems not to be frivolous. Farrill v. Head. Barnes, 41.

Plaintiff moved for an attachment against P. for acting as an attorney, and pleading pending a forejudger, and a rule was made to shew cause. The day before cause shewn, P. applied

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### Of Proceeding against an Attorney DEFEN-DANT in the COMMON PLEAS.

applied to Mr. Justice F. Aland, and obtained an order (without fummons) to be restored to his privilege, (without payment of costs) upon entering a common appearance at the parties fuit by whom he was forejudged; and it not appearing that P. had any notice of this old dormant forejudger obtained seven years ago, the rule was discharged. Butler v. Pincent. Barnes, 41.

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# Of Proceeding against an Attorney DEFEN-

When an attorney defendant has appeared to a bill filed against him in court, the subsequent proceedings throughout the cause are the same, as in causes against indifferent persons; only the writs, such as the venire, babeas corpora, distringues, Sc. are made returnable on a day certain in term, and not on a general return day.

It has been faid, that process of execution against an attorney has no occasion to be made out returnable on a day

certain, for execution begins when the cause is ended.

But a ca. fa. (which was made returnable on a general return, instead of a day certain) on motion was quashed, and defendant (attorney) ordered to be discharged by supersedeas, with costs, he consenting to bring no action. For per cur. defendant could not take advantage of this matter on error; and as he could not, it is unreasonable to keep him in custody till the determination thereof. Barnes, 413. So that it is the safer way, if it is not absolutely required, to make the process of execution, as well as the mesne process, returnable on a day certain.

The plaintiff, an attorney, having sued by his attachment of privilege, was nonsuited, and afterwards taken upon a ca. sa. for the costs, upon the judgment of nonsuit returnable on a general return day, and the court held it well enough. For though all process, both for and against an attorney, is made returnable on a day certain, because of his daily attendance in court; yet when an attorney is out of court, as in the case above, and in custody in execution, he has no day in court, so cannot attend; and therefore in such case he loses his privilege to have his process against him returnable on a day

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# Of getting an Attorney discharged when arrested.

IF an attorney is sued otherwise than by bill, and arrested, and in custody, by virtue of process, in order to get his discharge, he must sue out his writ of privilege from the court wherein he is an attorney; and to obtain which he must get a certificate from the master's clerk in B. R. or clerk of the warrants in C. B. that the defendant is an attorney of the court, which certificate is an authority for the signer of the writs in B. R. or prothonotary in C. B. for signing the same, for which nothing is paid, only 7 d. to the sealer; which writ must be allowed by the court or Sheriff wherever it is directed, who will thereupon make out a supersedeas for the defendant.

But in C. P. it was held, that an attorney of B. R. arrested by capias on a special original, out of the same court, is not entitled to his discharge, by serving the Sheriff with a writ of privilege, but must plead it sub pede sigilli. Crosby v. Shaw. East. 16 Geo. 3. C. B. 2 Blacks. Rep. 1085.

#### A writ of privilege is to the following effect:

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Of

GEORGE the third, &c. To the judges of our court of our palace at Westminster, and to every of them greeting: Whereof the bench, or as, according to the custom of our court { before us, Westminster, hitherto used and approved of in the same; the attornies of the same court, { of the bench, or } whilst they are profecuting or defending fuits and actions therein for their clients, ought not, nor have they, from time immemorial, been used to be compelled to answer before any of our justices or officers, or any other fecular judges whatfoever, upon any pleas, plaints or demands, which do not particularly belong to us (pleas of freehold felonies and appeals excepted) fave only before \ our faid justices of our faid court of the bench; or thus, before us by bill ex- ? hibited in our faid court before us, and not by writ. whereas we have lately received information, by the complaint of A. B. gentleman, one of the attornies of our faid court, { of the bench, or before us, } that feveral ill disposed persons

intending to disquiet the said A. have issued forth and prosecuted out of our court of our palace of Westminster, one or K 3

# Of getting an Attorney discharged when arrested.

more writ or writs, returnable before you in the fame court, or one or more precept or precepts returnable in our faid court, before you or one of you, against the said A. and threaten to arrest and detain him in your custody there. upon, in fuits which do not relate to us, (or in pleas of freehold, felonies, or appeals excepted) whereby the faid A. B. is unable to attend his faid office as an attorney, upon feveral affairs and fuits depending in our faid court s of the bench, or which, if it is permitted, will manibefore us, 10 feftly take away, and be not only in derogation and diminution of the jurisdiction of our said court s of the bench, or and the liberties and privileges thereof; but also to the great detriment of the said A. and his clients. And because we are willing that the jurisdictions, privileges, and cuftoms, for fo long time used and approved in our faid court { of the bench, or } should be inviolably before us, kept and observed: We command you, and every of you, that you defift from taking the faid A, B. into your custody, upon any writ or writs, precept or precepts: and if the faid A. B. be detained in your custody by any writ or writs, precept or precepts, other than fuch as particularly concern us, (pleas of freehold, felony, and appeals, only excepted) that then you discharge the said A. B. out of your cuftody, and fuffer him to go at large, as you will answer the contrary at your peril; and, that you inform the party or parties, plaintiff or plaintiffs, in the plaint or plaints, that he, the, or they, may profecute his, her, or in our court of their action or actions, fuit or fuits, the bench, or by bill to be exhibited to our justices of before us, the said bench, or to us at Westminster, against the said A. B. if he, she, or they, shall think it expedient so to do. Witness, &c.

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## Of Proceeding against Officers of the Courts.

LL the officers in the court of King's Bench, as well as the attornies, have the privilege of fuing by attachment, and being fued by bill in actions by and against them in their own right, and where they are not joined with others, except in pleas of land, of which the court of Common Pleas

alone has jurisdiction.

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But the officers of the Common Pleas, amongst whom are the ferjeants, prothonotaries, fecondaries, clerks of the prothonotaries, serjeants clerks, clerks of the judges, &c. have not the privilege of being sued there by bill as attornies have, but the privilege of being fued there in every fuit [except appeals] by original writ, because they are supposed not to be always present in person in court, as attornies are. Baker v. Swindon. Ld. Raym. 309. 3 Salk. 283. 1 Barnes, 280. Holt, 589. Adj. P. 6 W. & M. C. B. Windford. Rot. 685.

Baker v. Duncalf, 3 Lev. 398.

But it was agreed in Serjeant Scroggs's case, that the privilege of C. B. which Serjeants claimed, extended only to inferior courts, and not to the courts of Westminster Hall; and that he may be fued in either of these, because he is not confined to that court alone, but may practife in any other court.—But it is otherwise as to attornies or filazers, who cannot practife in their own name in any other court but fuch as they respectively belong to; and that therefore a serjeant at law is to be fued by original, and not by bill of privilege. 2 Lev. 129. 3 Keb. 424. 4 Mod. 226. So of the fervant of a serjeant at law. Cro. Car. 84.

Note: The judges have privilege of being fued in their

own court. Vide 3 Leon. 149.

But if the Chief Justice of the King's Bench bring an action there, the placita must be before the other three judges, omit-

ting the chief. Vide Ld. Raym. 778.

Defendant pleaded his privilege as a serjeant, with a writ annexed: but for want of an affidavit that he had business in C. P. and there only, the court fet it afide. Stiles v. Mead. Stra. 738.

# Df privileged Persons.

Of the Privileges of Peers and Members of Parliament.

PEERS are created, as is faid in our law books, for two reasons: 1. Al confulendum. 2. Al defendendum regem, for which reasons the law gives them certain great and high privileges. Vide 7 Rep. 34. 9 Rep. 49. 12 Rep. 96.

refled, neither capias nor exigent lies against them.

2. For the honour and reverence which the law gives to nobility, their bodies are not subject to torture in causa criminis lafa majeftatis.

3. They are not to be fworn in affizes, juries, or other

inquefts.

4. If any fervant of the king, named in the cheque-roll, compass or intend to kill any lord of parliament, or other lord of the king's council, this is felony.

5. In the Common Pleas, a lord of parliament shall have knights returned on his jury. [This privilege is taken away by ftat. 24 Geo. 2. c. 18. f. 4.]

6. He shall have day of grace.

7. A lord of parliament shall not be tried in case of trea-Jon, felony, or misprisson of them, but by those who are noble

and peers of the realm.

8. In trial of a peer, the lords of parliament thall not fwear, but they may give their judgment super fidem et ligeantiam Domino Regi debitam, to that their faith and allegiance stands in equipage with an oath in the case of a common person in trial of life. And the writs of parliament, directed to the lords of parliament, are fub fide et ligeantia, &c. And the reason and cause that the king gives them many other privileges, is for this, because all honour and nobility is derived from the king, as the true fountain, and he honours with pobility for two caufes. 1. Ad confulendum, and for that reason he gives them a robe. 2. Ad defendendum regem et regnum, and for that cause he gives them a sword. 12 Rep. 96. and reset to decement lad

In Jenkins [107] the following privileges are laid down as belonging to peers. It. They are entitled to a letter millive \*. act

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That is, when they are proceeded against in Chancery, the Lord Chancellor is to fend them a letter, to request his appearance, together with a copy of the bill; but if he does not appear upon the letter, then a subpæna goes as against others.

# Of the Privileges of Peers and Members of Parliament.

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2. They have a knight to try any issue which concerns them [but now this is taken away by the stat. 24 Geo. 2.] 3. They are not to be arrested for debt, trespass, or other personal action. 4. They are exempted from serving on juries. 5. To have no day of grace against them. 6. Upon the trial of a peer for treason or selony, his peers try him upon their honour only, and not upon oath. 7. When they pass through any of the king's forests to attend upon the king, upon blowing a horn, they may have a buck or doe, as the season of the year is. 8. They have power in their house to reverse judgments given in the King's bench. 9. They have the benefit of clergy, though they cannot read. 10. They are not liable to find carriages for the king when he removes from one place to another.—Many of these privileges are now obsolete.

All peers, without any distinction as to degree or rank, are entitled to the privilege of peerage alike; for they are equally obliged to attend the service of the publick, and are always supposed amenable to justice, and to have sufficient property to answer in suits and actions brought against them; and for these reasons, are not to be arrested or molested in their persons. Bacon's Abr. tit. Privilege, 4 Vol. 228.

This privilege from arrests extended formerly to abbots, as it does to bishops, \* members of the convocation, and members of the House of Commons at this day.

The privilege of parliament, according to the law of parliament, is of a very extensive nature, as may be seen by various resolutions and orders, in the journals of both the houses: but various statutes which parliament has condescended to make, have taken away many privileges which were heretofore claimed. However, there is one standing resolution and order in the journals of both the houses, that no court whatever shall presume to determine concerning the privilege of parliament, as settled by the rules and orders of each house, they themselves claiming to be the sole judges of their respective privileges; of which order, the king's courts incidently take notice.

The privilege of a peer from arrests extends only to peers of England, so that a nobleman of any other country, or

<sup>\*</sup> Eq. Caf. Ab. 349. 3 Chan. Rep. 38.

### Of the Privileges of Peers and Members of Parliament,

a lord of Ireland, hath not any other privilege in this kingdom than a common person. Also the son and heir apparent of a nobleman is not entitled to the privilege, which is confined to such persons as are lords of parliament at the time. But it seems that an infant peer is privileged from arrests, his person being held sacred. Co. Lit. 156. 2 Inst.

48. 3 Inft. 30. pl. 19.

The peers of Scotland had no privilege in this kingdom before the union; but by the twenty-third article of the union, the fixteen elected peers shall have all the privileges of the peers of the parliament of Great-Britain. Also, all the rest of the peers of Scotland shall have all the privileges of the peerage of England, excepting only that of sitting and voting in parliament. Stat. 5 An. c. 8. 2 Stra. 990. Fort. 163. P. Wil. 583. Since which statute, the person of a Scotch peer has been held to be privileged from arrests.

The twenty-third article of the union, upon which this privilege is claimed by a peer of Scotland, not one of the fixteen, fays, that the peers of Scotland shall have all the privileges of peers of Great-Britain, except the right and privilege of fitting in the House of Lords, and the privileges depending thereon. Now, as every privilege, claimed by a peer, solely depends, and is in consequence of his sitting in parliament, that is, being an actual lord of parliament, it feems, that the allowing all the Scotch peers the privilege from arrests, is not within the words of the act of union, the only law under which the Scotch peers to this day, can claim any privilege here at all. However, peers of Scotland always claim privilege, and in all cases are proceeded against as peers of England are. But I do not know that there has ever been a judicial determination on the subject.

A peeress by birth, is entitled to privilege. 2 Inst. 50. Sty. 222. 234. 252. Fort. 162. Vent. 298. Eq. Cas. Abr. 349. Co. Lit. 16. a. 6 Rep. 53. b. Dy. 79. pl. 51. Order of the House of Peers, 21 Feb. 1692. But it was doubted, whether a peeress by patent only for life, is entitled to this privilege. Styl. 234. 252. Held that she is not entitled,

Sty. 254. but adjourned.

A peeress by marriage, is entitled to privilege, and that as well during the coverture, as after: But as a peeress by marriage loses ther dignity by marrying a commoner, after such marriage she is not entitled to any privilege. Co. Lit. 16. 6 Co. 53. Dyer, 79.

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### Of the Privileges of Peers and Members of Parliament,

In lord Banbury's case, it was holden by Holt ch. just. that where a person is called by writ to the House of Peers, he is no peer till he sits in parliament, the writ giving him no nobility or honour; but that it was sitting in the House of Lords, and associating with them, that ennobled his blood; and that therefore, if the king or he dies before the parliament meets, the writ is determined, and the party remains a commoner: but he held it otherwise in a creation by letters patent, by which the party is immediately noble without any other act or ceremony; and though the parliament never meets, or the king dies, the nobility remains to him and his posterity, according to the limitations in the patent.

Formerly, the privilege from arrests extended to the servants of peers; and was also claimed by their tenants in old times. And the horses, and other goods and chattels of peers, were privileged from distresses. But these privileges have been either abolished by statute, or have become obsolete from not being claimed.

If a commoner who has been held to special bail, moves to be discharged on common bail, the court will not grant a rule to shew cause, upon an affidavit only: but upon the attendance of the clerk of the crown, or his deputy, with the sheriff's return, then they will order the rule to go. Femvick v. Fenwick. Mich. 2 Geo. 3. 2 Blaks. Rep. 788.

Note, The privilege of parliament does not extend to high treason, selony, breach of the peace, or surety of the peace. 4 Inflit. 25. 2 Hawk. P. C. 424.

And note, The privilege of a Peer commences from the teste of the writ of summons, or date of the letters patent; and the privilege of a Commoner immediately upon his election; but if he be arrested, or in execution, before his election, he shall not have privilege as to that suit.

By 12 & 13 W. 3. c. 3. An act for preventing any inconveniences that may happen by privilege of parliament, it is enacted, "That any person or persons may commence or prosecute any action or suit, in any of his majesty's courts of record at Westminster, &c. against any peer of the realm, or lord of parliament; or against any of the knights, citizens, and burgesses of the House of Commons, for the time being; or against their or any of their menial, or other servants, or any other person entitled to the privilege of parliament, at any time from and immediately after

#### Of the Privileges of Peers and Members of Parliament.

after the diffolution or prorogation of any parliament, until a new parliament shall meet, or the same be re-affembled: and from and immediately after any adjournment of both houses of parliament, for above the space of fotherteen days, until both houses shall meet or re-assemble: And that the faid respective courts shall and may, after such dissolution, prorogation, or adjournment as aforefaid, proceed to give judgment, and to make final orders, decrees, and fentences, and award execution thereupon; any privilege to the con-

trary, &c."

Provided, "That this act shall not extend to subject the person of any of the knights, citizens, and burgesies of the House of Commons, or any other person entitled to the privilege of parliament, to be arrested during the time of privilege. Nevertheless, if any person or persons, having cause of action or complaint against any peer of this realm, or lord of parliament, such person or persons, after any diffolution, prorogation, or adjournment as aforefaid; or before any fession of parliament, or meeting of both houses as aforefaid, may have fuch process out of his majesty's courts of King's Bench, Common Pleas, and Exchequer, against fuch peer or lord of parliament, as he or they might have had against him, out of the time of privilege. And if any person or persons, having cause of action against any of the faid knights, citizens, or burgeffes, or any other-perfor entitled to the privilege of parliament, after any dissolution, prorogation, or adjournment as aforefaid; or before any fessions of parliament, or meeting of both houses as aforefaid, fuch person or persons, may prosecute such knight, citizen, or burgefs, or other person entitled to the privilege of parliament, in his majesty's courts of King's Bench, Common Pleas, or Exchequer, by fummons and diffress infinite, or by original bill, and fummons, attachment and diffress infinite thereupon, to be iffued out of any of the faid courts of record, which the faid respective courts an hereby empowered to iffue against them, or any of them, until he or they shall enter a common appearance, or file common bail to the plaintiff's action, according to the course he performs of each respective court. And any person or persons, having a parlicular of suit or complaint, may, in the times aforesaid, ess sha exhibit any bill or complaint against any peer of this realm, he real or lord of parliament; or against any of the said knights, im out citizens, or burgesses, or other person entitled to the primary suites.

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### Of the Privileges of Peers and Members of Parliament.

vilege of parliament, in the high court of Chancery, court of Exchequer, or duchy court of Lancaster, and may proceed thereon, by letter or subpœna, as is usual, &c. "But not

to arrest the body of any knight, &c."

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By fect. 3. "That where any plaintiff shall, by reason or occasion of any privilege of parliament, be stayed or prevented from profecuting any fuit by him commenced, fuch plaintiff shall not be barred by any statute of limitation, or nonfuited, dismissed, or his suit discontinued, for want of profecution of the fuit by him begun; but shall, from time to time, upon the rifing of the parliament, be at

liberty to proceed to judgment and execution."

By fect. 4. " No action, suit, &c. commenced against the king's original and immediate debtor for the recovery of any debt, &c. to the crown, shall be stayed or delayed by or under the colour or pretence of any privilege of pariament;" yet so nevertheless, " that the person or perons, of any fuch debtor or accountant, or person answerable or liable to account, being a peer of this realm, or lord of parliament, shall not be liable to be arrested or mprisoned, by or upon any such suit, order, &c. or being a member of the House of Commons, shall not, during the coninuance of the privilege of parliament, be arrested or imbrisoned by or upon any such order, decree, judgment, proces, or proceedings."

By the 2 & 3 of Anne, c. 18. An act for the further exlanation and regulation of privilege of parliament, in reation to persons in publick offices, it is enacted, "That my action or fuit may be commenced or profecuted against ny officer or person entrusted or employed in the revenue, for any forseiture, misdemeanour, or breach of trust, so, and shall not be stayed or delayed by or under colour of the r pretence of any privilege of parliament, although such the same of the realm, or lord of parliament, nent, or one of the knights, &c.

Provided, "that nothing therein shall extend to subject course he person of such officer, being a peer of the realm, or lord naving f parliament, to be arrested or imprisoned: but that all prorefaid, els shall issue against such officer or person, being a peer of realm, he realm, or lord of parliament, as should have issued against hights, im out of the time of privilege: not shall extend to the perpen of such officer, being a knight, citizen, or burgess of the vilege sof Gommons, to be arrested or imprisoned, during the

### Of the Privileges of Peers and Members of Parliament.

time of privilege of parliament; and that against such officer or other person, being a knight, citizen, or burgess of the House of Commons, entitled to privilege, shall be issued summons and distresses infinite; which the said respective courts are hereby empowered to issue in such case, until the party shall appear upon such process, according to the course of

fuch respective courts."

The act of 12 & 13 W. 3. c. 3. restraining only the privilege of parliament, in actions or fuits commenced in the courts therein specified, by the 11 Geo. 2. c. 24. in amendment of the act of king William, it is enacted, "That any person and persons shall and may commence and prosecute, in Great Britain or Ireland, any action or fuit in any court of Record, or court of Equity, or court of Admirally; and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary against any peer or lord of parliament of Great Britain; or against any of the knights, citizens, and burgesses of the House of Commons of Great Britain, for the time being, or against them and any of their menial and other servants, or any other person entitled to the privilege of the parliament of Great Britain, at any time from, and immediately after the diffolution or prorogation of any parliament, until a new parliament thall meet, or the fame be re-affembled; and from and immediately after any adjournment of both houses of parliament, for above the space of fourteen days, until both houses shall meet or re-assemble; and the said respective courts may proceed, &c.

Provided, "That the faid act shall not extend to subject the person of any knight, &c. to be arrested during the time of privilege. And sect. 2. authorizes proceeding as above in any of the courts of great sessions in Wales, courts of session in the courts of palatine of Chester, Lancaster, and Durham; the courts of King's Bench, Common Pleas, and Exchequer, in Ireland, after any such dissolution, &c. And the court of Chancery, in Ireland, and equity of Exchequer, are authorized to proceed in like manner as the court of Chancery, and equity court of Exchequer in England may, against any peer, knight,

&c. after fuch dissolution, &c."

Sect. 3. faves the ftatute of limitations in like manner as

the act of king William.

And by fect. 4. No action or fuit commenced against the king's debtor, &c. to be stayed in any court in England or Inland [as by fect. 4. in the act of king William.]

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# Of the Privileges of Peers and Members of Parliament.

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And lastly, by the flat. 10 Geo. 3. c. 50. The preamble of which states, that the acts already in being are infufficient to obviate the inconveniences arising from delay of fuits, by reason of the privilege of parliament, it is enacted, "That any person or persons shall and may, at any time, commence and profecute any action or fuit, in any court of Record, or court of Equity, or of Admiralty; and in all causes matrimonial and testamentary, in any court having cognizance of causes matrimonial and testamentary, against any peer, or lord of parliament of Great Britain; or against any of the knights, citizens, or burgefles, and the commifhoners for thires and burghs of the House of Commons of Great Britain, for the time being; or against their or any of their menial or any other fervants, or any other person entitled to the privilege of parliament of Great Britain: and no fuch action, fuit, or any other process or proceeding thereupon, shall, at any time, be impeached, stayed, or delayed, by or under colour or pretence of any privilege of parliament."

2. Provided, that "Nothing in this act shall extend to subject the person of any of the knights, citizens, and burgesles, or the commissioners, &c. for the time being, to be arrested or imprisoned upon any such suit or proceedings."

3. And whereas the process by distringus is dilatory and expensive: For remedy thereof, be it enacted, "That the court out of which the writ proceeds, may order the issues levied, from time to time, to be sold; and the money arising thereby, to be applied to pay such costs to the plaintist as the said court shall think just, under all the circumstances, to order; and the surplus to be retained until the desendant shall have appeared, or other purpose of the writ be answered."

4. Provided always, when the purpose of the writ is anfwered, that then the said issues shall be returned; or if sold, what shall remain of the money arising by such sale, shall be repaid to the party distrained upon.

5. And it is further enacted, "That obedience may be enforced to any rule of his majesty's courts of King's Bench, Common Pleas, or Exchequer, against any person entitled to privilege of parliament, by distress infinite, in case any person or persons, entitled to the benefit of such rule, shall chuse to proceed in that way: and the last clause extends them to solution.

The

#### Of the Privilege of Peers and Members of Parliament.

The only way by which courts of justice could anciently take cognizance of privilege of parliament, was by writ of privilege, in the nature of a supersedens, to deliver the party out of custody when arrested in a civil suit. For when a letter was written by the Speaker to the Judges, to stay proceed. ings against a privileged person, they rejected it as contrary to their oath of office. But fince the flatute 12 W. 3. which enacts, that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular ab initio, and that the party may be discharged upon motion. It is to be observed too, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statutes of 1 fa. 1. c. 13. and 12 W. 3. c. 3. (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes; or, as it hath been frequently expressed, of treason, felony, and breach (or furety) of the peace. So that no privilege was, or is allowable in any crime or misdemeaner whatfoever, for these are treated of by the law as being contra The sergebol bulles to this effect, pacem domini regis.

Indultion to with A. It complains of the Right Homourans John Earl of --- (ar if a minit a coignic ref. of \$\subseteq\$ 1/45) having privilege of parhament for that, \$\delta \subseteq\$ 1/45) having privilege of action as the cake happens to be a coincidence of the tend A. It of seen pounds, and therefore his brings full, and hereupon the laid A. It prevente process of the process of the total che kings, according to the form of the hands on the hands of the first made only provided to him thereon to be made, and Ic is granted to him thereon to be made, and Ic is granted to him the continued.

Pirtiges, John Dues !

I he formmone thereon is to this effect?

George end Tuled, &c. To the Shariff of Middlefer, greeting We constraint you cause to be reasoned (numing the defendant) has ing privilege of parliament that he hadre an object before our rathers if in C. D. or next after to answer to it. B. as a pie of (and even as as as a secondary so it is a constraint or answer to it. B. as a pie of (and other is) as a first that he able restorably to from that he said to answer that the said.

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#### Of Proceeding against Peers and Members of Parliament.

BY the statute 11 Geo. 3. before-mentioned, the privilege is wholly taken away from the servants of peers and members of parliament, so that they may be proceeded against as other indifferent persons—and suits may now also, since the above flatute, be commenced at any time, whether the parliament is litting or not litting, against any peer or member

Peers and members of parliament may be proceeded against two ways, viz. by original writ, and by original bill, [according to the 12 and 13 William 3.] in either court, except that they cannot be proceeded against by original writ in B. R. in all actions; but in those actions only, such as case, trespass, getment, replevin, and debt, which the King's Bench can hold plea of by original writ.

If the plaintiff proceeds by bill against a peer or member of parliament, he must file his original bill, containing the whole cause of action against him, with the clerk of the declarations, if in the King's Bench; or with the Prothonotary, if

in the Common Pleas.

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The original bill is to this effect:

Middlefex to wit. A. B. complains of the Right Honourable John Earl of — (or if against a commoner, of C. D. Efq;) having privilege of parliament for that, &c. (reciting the cause of action as the case happens to be) to the damage of the faid A. B. of 1000 pounds, and therefore he brings fuit; and hereupon the faid A. B. prays the process of the lord the king, according to the form of the flatute in such case, made and provided to him thereon to be made, and it is granted to him, &c.

Pledges, Fohn Doe, and Richard Roes

The fummons thereon is to this effect:

George the Third, &c. To the Sheriff of Middlesex, greeting. We command you that you cause to be summoned, (naming the defendant) having privilege of parliament, that he be before us, (or before our justices if in C. B.) on to answer to A. B. in a plea of, (as the next after case is) as he shall be able reasonably to shew that he ought to answer therein, and have there this writ, witness, &c.

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#### Of Proceeding against Peers and Members of Parliament.

In the King's Bench, the fummons and its subsequent process, attachment and distringas, when the fuit is by bill, do not state the cause of action at large, but only generally as to answer the said A. B. in a plea of trespass on the case to bu damage of, Sc. or that he render to the said A. B. 1000 l. as Whereas if the fuit is by original, the subsequent the case is. process of distringus thereon states the cause at large as in the original writ. And in C. B. whether the proceedings are by bill or original, all the process thereon states the whole as in the original bill or writ filed.

The fummons and other process, when by bill, need not have fifteen days between the tefte and return, tho' it must be made returnable on a day certain. But when by original, they must have fifteen days between the teste and return, and

must be made returnable on a general return.

If the plaintiff proceeds by Original, against a peer, or conmoner, the plaintiff makes out a pracipe, as instructions for the cursitor to frame the original writ. This writ must then be delivered to the Sheriff, who will cause the defendant, if within his bailiwick, to be summoned thereupon. A copy of the original is usually made out by plaintiff's attorney for the Sheriff, and that is served as the summons on the defendant.

Upon the return of the original, it is filed with the filazar if in B. R. or cuftos brevium if in C. B. and if the defendant appears, the proceedings are the same as in other cases; but if he does not appear, and should cast an effoign, which it feems he may do any time before the return of the original writ, but not afterwards, the plaintiff is delayed a whole term, as the defendant has till the first return of the next term to appear; and then, should the defendant not enter an appearance, the effoign must be adjourned to a further day by the plaintiff; upon which day, and the like default, the plaintiff may then fue out a distringas. However, the casting an effoign is seldom done at this day, as the courts fet themselves against such obsolete practice, and consider it nothing more than a trick, calculated for the purpose of delay, and a great abuse of the law; and should the practice of effoigns be revived, there is no doubt but that the courts would instantly make such new rules and orders, as would of justice which they formerly did. Vide the cases of Anfan v. Jefferson, C. B. 2 Will. 164. - And Barclay v. Earle. Stra. 1194.

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#### of Proceeding against Peers and Members of Parliament.

Should no appearance be entered upon the return of the original, or essential, the plaintiff's attorney makes out a practipe for a distringues, and carries it to the proper filazer, to draw out the same, which must be sealed; and is in the following form:

Britain, France, and Ireland, king, defender of the faith, Et. To the fheriff of Middlefex, greeting. We command you, that you diffrain A. B. Eig; having privilege of parliament, by all his lands and chattels in your bailiwick, so that neither he, nor any one for him, do intermeddle therewith, until you shall have other command in that behalf from us; and that you answer us for the issues of the same, so that you have his body before us [or if in C. B. before our justices at Westminster, on—a general return day] to answer C. D. in a plea of, &c. [reciting the original as before] to the damage of the said G. of one hundred pounds; and have you there then this writ.

Witness, &c. this day of in the twen-

If the defendant does not appear at the return of the dilingas, the plaintiff's attorney must call upon the sheriff o return the writ, whereupon he may sue out an alias; and, upon the return of that, a pluries distringas. But intead of proceeding as formerly, by the writ of distringas ad abilitum, the plaintiff may now move the court out of which he writ issues, by virtue of the 10 Geo. 3. c. 50. s. 3. for he sheriff to enlarge the issues, which the court will accordagly order to be encreased, to the amount of the plaintiff's emand.

This motion, is a common motion, and requires neither ouce nor affidavit.

The courts used upon motions to encrease the issues, to reder double the issues returned from time to time, and not other to encrease the same. But the King's Bench and Expequer having done more, the court of Common Pleas, to be conformity with them, order them to be encreased to more and double; and, on motion to encrease issues on the pluries strings to a good sum (an assidavit being produced that the debt was 150 s.) they ordered issues to be returned on the wries distrings to 20 s. Barnes, 418.

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# Of Proceeding against Peers and Members of Parliament.

And where the debt appeared by affidavit to be 1950, and 40 shillings had been returned on the first distringar, the court, on motion, made a rule that the sheriff should return 201. issues on the alias. Barnes, 420. And afterwards, on motion to encrease the issues on the pluries to sive times as much as the last (the usual way in C. B) they were ordered to be encreased to 1001, and afterwards, on the pluries, to 5001.

On motion to encrease issues, it is discretionary in the court to order the amount; and they may order to the full amount on the first motion, if they think proper. And the course of the King's Bench is now, on motion, to order the amount of the whole debt to be levied on the alias.

The plaintiff, in an action against a member of parlia. ment, had proceeded agreeable to the act of 10 Gm. 2 c. 50. and had obtained rules for felling the issues leviel upon a distringas, alias, and pluries; and also a rule for a attachment against the sheriff: but no issues had been a. tually levied, and at length defendant appeared; when upon it was moved, that these rules should all be discharged For as no issues had been levied, they could not be folk; [vide fect. 3. of the flatute 10 Geo. 3. c. 50.] and as the defendant in the action had now appeared, the end an purpose of the writs were answered. On the other his the plaintiff infifted on the costs of issuing the writs, before the rules should be discharged. And the court thought the reasonable; and directed, that on payment of costs the rule should be discharged. They were of opinion, that the costs were not to attend the event of the fuit, but were n be paid to the plaintiff at all events, whether he show finally fucceed in his fuit or not. Martin v. Townfend and Sawbridge. Burr. Rep. 4 pt. 2725

The form of the declaration against a peer or commoner original, is thus:

Middlefex. A. B. Esq. for whatever his title is having privilege of parliament, was summoned to answer C. D. in a plea, &c.

the King's Bench remained as before

It is however very remarkable, that willid it if in And

Middlesex, to wit, C. D. complains against A. B. Esq; having privilege of parliament, &c. — and though the sw

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## Of Proceeding against Peers and Members of

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is in the King's Bench by bill, the defendant must not be declared against, "as being in the custody of the marshal of the Marshalfea." Sayer Rep. 63, 64.

If the declaration should be in an action of assumptit against a peer, the plaintiff must take care, in assigning the breach, not to use the following words, as is usual against a common person; "but contriving, and fraudulently intending, "crastily and subtily, to deceive and defraud the said C. D. in this behalf;" for the House of Lords have adjudged it a very high contempt and misdemeanor in any person, to charge their noble body with any species of fraud or deceit. But insuch case, against a member of the House of Commons, those words may be inserted, as there is no standing order to the contrary; the resentment of the members of that honourable house having never yet been irritated at the charge.

A bill of Middlefex was issued out of B. R. by an attorney of the court, against the countess of Huntingdon, which was discharged by fuperfedeas, without pleading, because it appeared by the record that she was a peeress; and the attorney was committed for suing out the process. Vent. 298.

In Trinity term, 18 George 3. in the King's Bench, in the case of Gossing and wife, against lord viscount Weymouth, it was argued, whether a peer could be sued there by bill of privilege. And adjudged that he might. The case was:

Plaintiffs commenced an action against lord Weymouth, by bill of privilege, to which he pleaded in abatement, that he ought to have been sued by original writ, and not by bill of privilege; and thereupon, there was a demurrer and joinder. On the argument of which, the court relied on the case of Say against lord Byron in that court, a few years before, and awarded a responders ouster.

The case of Say and lord Byron came on before B. R. on a motion to set aside a distringas issued against lord Byron by bill, and the court, having directed precedents to be searched, sound, that it had been the uniform practice and usage to proceed against peers in that court by bill of privilege before the statute 12 & 13 W. 3. and as that act made no difference in that respect, it was held, that the jurisdiction of the King's Bench remained as before.

It is however very remarkable, that when the act of king William went to the lords for their concurrence to the proceedings therein, against the members of both houses, by bill

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#### Of Proceeding against Peers and Members of Parliament.

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clause relating to themselves being sued by ariginal bill and summons, and sent back the amended bill to the commons; which afterwards passed accordingly. Which clearly proves, that the lords, at that time, did not think themselves included therein.

The court therefore, relying on their jurisdiction before the statute of king William, determined that a peer may be such by bill in B. R. but as this determination is founded solely on the jurisdiction of the court, and the uniform practice thereof before the statute, it may be still a question in the court of Common Pleas, whether a peer can be such there by original bill and summons thereon\*.

All the subsequent proceedings to the declaration against a peer or privileged person are the same as in other cases, except that their bodies cannot be taken in execution, unless the judgment is obtained upon a statute staple, or statute merchant, or upon the statute of Acton Burnell II Edw. I. and then a capias ad satisfaciendum lies even against peers of the

realm

A motion was made by Lord Banbury for a supersedeas to a latitat, which had issued against him by the name of Charles

But in C. B. a member of parliament was fued by original bill and fummons thereon, and after judgment for plaintiff, error was brought thereon into B. R. general errors assigned. Objected that the Common Pleas could not hold plea against a member of parliament by bill, which depends on statute 12 & 13 W. 3. Sed per cur. On looking into the statute, the intent of the parliament must be collected from the words, and they are express, that a member of parliament may be fued in either of the courts, by summons and distress infinite (which refers to proceedings by original writ) or by original bill and summons, attachment and distress, thereupon to be issued out of any of the faid courts which they are empowered to issue. Then the words, according to the course of each respective court, refer only to entering the common appearance on filing common bail. Then by the provifo, that nothing in that act should give any jurisdiction or power to any court to hold plea in any real or mixt action, in any other manner than fuch court might have done before the making that act, they defigned to give a jurisdiction to hold plea in perfonal actions, in another manner than they could have done before. Judgment offirmed. Dawson v. Burridge, 1442. S. C. Stra. 734. Knotlys.

#### Of Proceeding against Peers and Members of Parliament.

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Knollys. But the court denied the motion, and the Chief Justice said, they could not take notice that this Charles Knollys is Earl of Banbury: and that there was a difference between this case and the case of a Peer that had sat in the house. For if his lordship had ever been summoned to parliament, and had a writ to shew, and there was no dispute about the identity of the person, it would have been reasonable to have granted a supersedeas. But in this case, of a lord that has never sat there, they could not do it, for they could not try peerage on a motion; but his lordship might plead it, and pray a supersedeas. And per Powel, if in the writ he had been named peer, it would have been superseded. Vide I Vent. 298. Ld. Raym. 1247. Salk. 512.

a par manifest proper are the fune is in other cafes, except that their bodies cannot be taken in recogney, unless the judgment is obtained upon a factor flaple, or flattle mancoast, it is not be flatter at heron Burnell yr Eden it and then a constant on factoring lies even against peers of the realm.

A motion vest made by E. i. Basimir for a Japarideas to a hittas, which had illust squant han by the name of Charles

<sup>\*</sup> Bartin C. E. a member of parliament was fined by original bill and femeral chercon; and after judgment for plaintiff, error was brough thereon into B. R. general errors affigued. Objected that the Common Pieus could not hold plea against a member of parhament by but, which depends on flatute 12 & 13 W. 3. and per car. Undoking into the fratute, the intent of the par hament must be confected from the words, and they are express, that a member of parliament may be fued in either of the courts, by furnitions and diffrefs infinite (which refers to proceedings by original wait) or by original bill and fummous, attachment and . different there ton to Le inced out of any of the faid courts which they are empowered to iffice. " Then the words, according to the course of each respective equit, refer only to entering the common appearance on filing common bail. Then by the prowife, and nothing in that set fliguld give any justifaction or pio co con court to hold picain toy read or more action, in any other manner than fuch court rought have done before the making that well they deligned to give a furifdiation to hold plea in perfenal ections, in another manner than they could have done betore, thogment chirmed. Damfon v. Burriage, La. kaym.

Of Proceeding by and against Corporations.

ORPORATIONS aggregate must fue and be fued by attorney, and therefore the proper process against them ration, the plaintiff is a diffringas. Co. Lit. 66.

A corporation cannot be effoigned, Dalt. 121. pl, 154.

Nor outlawed. 10 Co. 32. b.

No attachment lies against a corporation.

A corporation cannot be declared against as in the custody of the marshal. 6 Mod. 183. It nomenal or fired and

A corporation cannot fue as a common informer. 2 Stra. appearance

1241.

As outlawry does not lie against an aggregate corporation, therefore trespass does not lie against them; for a capies and exigent do not go. Bro. Corp. 43.

Corporations aggregate cannot diffrain in their own persons but by their bailiff, therefore replevin does not lie against them by the name of their corporation. Brownl. 175.

Corporations cannot fue without their head, or in time of

vacation of their headship. Wood's Instit, 110.

Corporations aggregate cannot commit treason, or be outlawed or excommunicated. 10 Rep. 32. 1 Rep. 127. 1 Inft. 134. a. or be executors or administrators. Ibid. Tho' 1 Roll. Abr. 915. contra, but quære? for they cannot take

They cannot be joint-tenants to take by furvivorships, but they may be tenants in common. Wood's Inflit. 110.

They cannot be feized to the use of another. Ibid. The members cannot regularly be witnesses for the corphration, especially if they testify for any considerable advantage or profit of the body. 2 Lev. 232. 236. 2 Str. 1069. For every member hath a right and freehold for his life as to his freedom, and all the members together have an inheritance in the lands, and an interest in the were attached to antwer (which cannot be). Defeathong

If a corporation fue, they must fue in the name of the corporation by an attorney appointed under the feal of the corand the court were of opunon, that as defendants at .noiterog

Corporations aggregate cannot be bound without deed, therefore no action lies against them, unless founded on a deed. But an action will lie against a corporation fole upon a promife; and if corporations aggregate have made a promile, the party's remedy for non-performance, is by bill in equity, to compel a specifick performance, as to make 2 Plaintiff declared in Nodelles. 1.38, shall wan bnAed , refuling to accept the declaration, it was left in

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#### Of Proceeding by and against Corporations.

And if a corporation is fued, it must be fued by its name of incorporation by original writ-and in order to fue a corporation, the plaintiff's attorney must make out a pracipe for an original writ, which original writ must be made out by the cursitor of the proper county, and duly filed with the flazer in B. R. or suffes brevium in C. B. on which a fummore must be made out, containing the whole cause of action, for the sheriff to summon them; upon which, if they appear, the proceedings are the same as in other cases; but their appearance must be by an attorney appointed under the common feal, and not in their own persons. Bro. Corp. 28.

If they do not appear upon the fummons at the return of the original writ, the plaintiff must take out a distringus, and proceed against them by distress infinite; and it is not fufficient if the particular persons distrained upon appear at the return of the process. Bro. Corp. 28. or if all the members of the corporation appear in person; but they must ap-

pear by an attorney appointed under feal.

Should the theriff return but small iffues on the distringus, the court, on motion, will order him to return greater.

In an action against the East-India Company for 5000 l. it was moved, that the sheriff might return exemplary iffues, because several writs of distringus had been already served to no purpose; and the court said, he should return good iffues; and if he did not, the plaintiff might bring an action against him; but at last he was ordered to attend.

Salk. 191. pl. 2.

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> Defendants (the bailiffs and burgeffes of East Retford) were fued in their corporate capacity, by common capias ad respondendum; and upon affidavit of service, an appearance was entered by plaintiff, according to the statute; and plaintiff entered a declaration in the office, reciting, that defendants were attached to answer (which cannot be). Defendants moved to fet aside the capies and proceedings thereon; objecting, they ought to be fued by Pone and distringus. And the court were of opinion, that as defendants are fued in a corporate capacity, the capias ad resp. is null and void: and the rule to shew cause was made absolute. agreed, that had the defendants themselves appeared, the objection had been waived. Langley v. the bailiffs and burgeffes of East Retford. Barnes, 415.

> Special original fued out in Lincolnsbire, and defendants Plaintiff declared in Middlesex, defendants appeared; refuling to accept the declaration, it was left in

#### Of Proceeding by and against Corporations.

fendants agent. Plaintiff sued out a new original in Middle-sex. The court held, the taking the declaration out of the office to be a waiver of the former proceedings, and discharged the rule, to shew cause why proceedings in Middlesex should not be stayed.—Note, An essign had been cast, and adjourned before desendants appearance; but the court did not hold that material. Marquand v. the mayor and burgesses of Boston in Lincolnshire. Barnes, 416.

The original word whealty recides the flature, Th. By Tal.

Strend, 274. 4 Mod. 296. 1 Brs. En co. But the ictial of the figure is not necessary, though a must flate the ortumilances of the robbers, and the plantiff's compliance

escumments. I also that he wast his and one gave writte of the robbery, described the security and since of the robe.

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process formerly used to be breed on some materials of the bundred. But in the S. Control of the solutions of the solutions of lact and or process for special or that solutions of lact and or that of them, and then the first of the solutions of the land of the solutions of the landered shade of the solutions of the landered wherein the solutions of the landered publicly notice tracted are given in the or the principal market towns within facellantic or the market towns within facellantic or the principal site in or the world performed with such process of it their facility appears to be no market town within the near the solutions of the soluti

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#### Of Proceeding against HUNDREDORS.

IF an action be commenced against hundredors, the suit in B. R. as well as in C. B. must be by original, for the inhabitants of an hundred cannot be in the custody of the marshal.

Web 126, 2 Saund 275, A Med 206

3 Keb. 126. 2 Saund. 375. 4 Mod. 296.

To proceed against an hundred on the statute of hue and cry, 13 Ed. 1. the plaintist must take out his original writ, which must be tested forty days after the robbery; [which forty days are allowed for the hundred to take the thieves by the statute of Winton. R. 3 Lev. 320.] and within a year

after the robbery. R. 1 Brownl. 156.

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The original writ usually recites the statute. Th. Br. 141. 2 Saund. 374. 4 Mod. 296. 1 Bro. Ent. 99. But the recital of the statute is not necessary; though it must state the circumstances of the robbery, and the plaintist's compliance with the statutes \*, viz. that he made hue and cry, gave notice of the robbery, described the felons, the time and place of the robbery; that within twenty days he caused notice thereof to be given in the London Gazette, described the robbers and robbery therein; that he entered into bond before the Sheriff to the high constable of the hundred, with condition for the security of the costs in case of being nonsuited, discontinuing, &c. that twenty days before the issuing of the writ, he made oath before a justice, that he did not know the parties who robbed him, and that the inhabitants of the hundred have not taken the robbers, &c.

The process served is a copy of the original writ, which process formerly used to be served on some inhabitant of the hundred. But by the 8 Geo. 2. c. 16. it is enacted, "That no process for appearance in any action to be brought upon the statutes of hue and cry, or either of them, against any hundred, shall be served on any inhabitant thereof, save only upon the high constable, or high constables, of the hundred wherein the robbery shall happen; who is required to cause publick notice thereof to be given in one of the principal market-towns within such hundred, on the next market-day after he or they shall be served with such process; or, if there shall happen to be no market-town within the hundred, then in some parish-church within the same hundred, immediately after divine service, on the Sunday next after his or their being served with such process; and he or they is and are

The statute of Winchester, 13 Edw. 1. c. 1. is explained and enforced by several subsequent statutes, viz. 27 El. c. 13. 29 Car. 2. c. 7. 8 Geo. 2. c. 16. 22 Geo. 2. c. 24. hereby

#### Of Proceeding against HUNDREDORS.

hereby impowered and required to enter, or cause to be entered, an appearance in the said action, and also defend the same for and on behalf of the inhabitants of the said hundred, as he or they shall be advised."

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The declaration must be against the inhabitants of the hundred generally; for if it is against any by name, and all

are not named, it will be bad. R. 2 Keb. 126.

The declaration need not recite the original at large, Reg. 1654. Mills 26. nor more of the statute than is pertinent to the action. 2 Ventr. 215. and must conclude contra formam statuti, i. e. the statute of Winton, for contra formam statutorum is bad. Yelv. 116.

If the defendants plead, and there is an issue, the venire facias shall be awarded to the next hundred. Thes. Brev. 144. quar. for since the 24 Geo. 2. c. 18. s. 3. it seems the venire should be awarded de corpore comitatus, except the

hundred against which the action is brought.

It judgment be given against the hundred, the sheriff, &c. upon receipt of any writ of execution against any inhabitant, instead of serving the same, shall cause the same to be shewn gratis to two justices of the county, riding, or division, [whereof one to be of the quorum] who are to caule such taxation and affefiment to be made, and to be levied, according to the 27 Eliz. [viz. by the constables, &c. rateably and proportionably, &c.] in which taxation and afsessment there shall be provided and included, over and above what the costs and damages recovered by the plaintiff in such action shall amount to, all such just and necessary expences, which the high constable of the hundred hath been at in defending fuch action, claim being made thereto by fuch high constable, before the said justices, upon due notice for that purpose given him; and the money, so to be levied, to be paid over by such constable, &c. within ten days after collection, to the Sheriff of the county, to the use of the plaintiff in fuch action, for fo much as his costs and damages recovered shall amount unto, and to the use of the said high constable, for so much as his expences in defending the faid action shall amount to; of which he shall give an account, and make proof thereof upon oath, to the fatisfaction of the faid justices, before any taxation shall be made for reimburling such high constable; and shall, in such expences, have no further allowance, toward paying an attorney to defend the faid action, than what fuch attorney's bill shall be taxed at by the proper officer of that court where the action

#### Of Proceeding against HUNDREDORS.

action shall be brought, which the said high constable shall cause to be taxed for that purpose. Stat. 8 Geo. 2. c. 16. s. 4.

The 7th feet. of the above act provides in what manner the constable shall be reimbursed his expences in case the plaintiff is nonsuited, &c. and becomes, or his sureties in the bond become, infolvent.

\*654. #4/18 26. nor more of the statute that is pertunent to the action. \*2 V ntrs 215. and must conclude range farman statutes. \*e. the statute of Winten, for contrassorman statutorum is each. \*1 do: 176.

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if judgment be given against the hundred, the sherish, expose secept of any writ of execution against any tanabitant, as tead of tarving the tame, shall cause the same to be shewn events to two assumes of the country, riding, or division, whereof one to be of the garried who are to cause such taxation and essentially the plants of the handred bath been at

high conflable of the hundred bath been at in detending fuch action, claim being made thereto by fuch tigh conflable, before, the faid juffices, upon due notice for that purpose given him , and the money, to to be levied, to be paid over by fuch conflable. On within ten days after col section, to the Sheriff of the county, to the vie of the plaintiff in fuch action, for fo much as his collis and damages in covered that amount unto, and to the nie of the faid high contrable, for fo much as his expenses in detending the law action thall amount to, of which he thall give an account. and make proof thereof upon oath, to the fatisfaction of the faid judgees, before any taxation finall be made for reimburting such high conflable? and shall, in such expences, have no further allowance, toward paving an autorney to deof the said action, than what such attorney's bill that Do taxed at by the proper officer of that court where the HoiBe

#### Of the Action of EJECTMENT.

THE action of ejectment is a mixed action, in which a leffee for years shall recover his term, and also his damages. 5 Co. 105. 9 Co. 77. and is almost the only remedy in practice for recovering land wrongfully withheld: Burr. 4 pt. 667. For it is real in respect of the lands, and perfonal in respect of the damages and Costs. Per Holt, ch. j. Comb. 250.

Real actions required so much nicety, and were attended, in old times, with so much trouble and expence, that the remedy by ejectment, was contrived to supply several defects which attended the bringing them; for in real actions the demandant could not recover any damages, only his possession; and if he was barred in one action, he could not regularly

bring another. 6 Co. 7. Ferrar's case.

The concluding a man by one action being often found fo prejudicial to his right, that the manner of forming a term for years, and the leffee's bringing an ejectment to recover his term, and thereby to affert the title of his leffor, was found out, and was first introduced in the 14 Hen. 7. \* [before which time the plaintiff in ejectment only recovered damages for the turning him out of possession, and did not re-cover his term in the premisses for, till about that time, leafes for years were but of a very thort duration, and were generally defeated or determined before any intricate title could be decided; and were fuch precarious possessions, with respect to the power that the owner of the freehold or inheritance had over them, that every fuch leffee was looked upon only as his bailiff or steward; and therefore, if ousted by a stranger, could only have recovered damages for the loss of his possession; or if turned out by his lesior, could only seek remedy from his covenants.

But as, about this time of Henry 7. leases for long terms began to creep into use, the lessess whereof, when molested, used to go, in order to secure themselves, into equity, against their lessors, for a specifick performance; and against strangers, to have perpetual injunctions to quiet their possessions, which, as it drew considerable business into the courts of equity, was probably one reason which induced the courts of law to come to a resolution to give judgment, that the lesses in ejectment should recover passession of the land itself, by the process of an habere facias possessionem; so that the object of the

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#### Of the Action of EJECTMENT.

action became entirely changed; for, as the plaintiff recovered the term itself, he had nominal damages only for the ouster, but not the messe profits; whereas, by the old writ of ejectment, he recovered nothing but damages for the ouster, the measure whereof were the messe profits of the estate ac-

cruing to the ejector fince the time of the oufter.

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The above resolution of the courts brought on a new method of trial, unknown to the common law. For now it became usual for a man that had a right of entry into any lands to enter thereon and seal leases; and then the person that next came on the freehold, animo possiblendi, was accounted an ejector of the lesse; by which means any man might be turned out of possession; because the lessee in ejectment would recover his term without any notice to the tenant in possession; so that the courts of law, to remedy this inconvenience and injustice, made it a standing rule, that no plaintiff should proceed in ejectment to recover his lands against such a seigned ejector, without delivering the tenant in possession a declaration, and making him an ejector and proper defendant if he pleased.

This rule of court became absolutely necessary upon the alteration of the object of the action of ejectment, which was now in rem; for otherwise, the court would have been instrumental in doing an injury to a third person; because a declaration might otherwise be delivered to a stranger, a seigned defence be made, and a verdict, judgment, and execution thereon obtained, whereby the tenant would have been ousled,

without notice of any proceedings against him.

Upon this notice to the tenant in possession, and affidavit thereof made, it was usual for the tenant in possession to move the court, that, as the title of the land belonged to him, he might defend the suit in the casual ejector's name; which the court, upon an affidavit of that matter, used to grant; and that the suit should be carried on in the casual ejector's name, the tenant in possession saving him harmless; and then the casual ejector was not permitted to release errors in prejudice of the tenant in possession, since the suit was carried on in his name by rule of court; and the process for costs was taken out against the casual ejector, who was obliged to resort to the tenant in possession to recover tack the same, and put his bond of indemnification in suit upon his resulal to pay them. Styl. 468. 1 Keb. 705. 740.

Also such leases were actually to be sealed and delivered, therwise the plaintiff could maintain no title to the term,

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#### .Of the Action of EJECTMENT.

and were also obliged to be sealed on the land itself, otherwife it amounted to maintenance by the old law, to convey a title to any one, when the grantor himself was not in possession.

But at this day there is regularly no necessity of fealing and delivering leafes on the lands, where there is an actual tenant or occupier of the lands, a much more expeditious and easy method of proceeding in ejectment having been invented by Lord Chief Justice Rolle, [ who fat in the upper bench, so called during the exile of king Charles the second and followed ever fince by the courts.

I have faid thus much of the action of ejectment, and the old method of proceeding therein, that the practifer and fludent may the better understand the modern practice relating

thereto, and the reasons on which it is founded.

The new method of proceeding in ejectment entirely depends on a ftring of legal fictions; no actual leafe is made, no actual entry by the plaintiff, no actual oufter by the defendant, but all are merely ideal, for the fole purpose of trying the title. To this end, in the proceedings, a leafe for a term of years is stated to have been made by him who claims title, to the plaintiff, who is generally an ideal fictitious person who has no existence, though it ought to be a real person. In this proceeding, which is the declaration, for there is no other process in this action, it is also stated, that the leffee, in consequence of the demise to him made, entered into the premisses; and that the defendant, who is also now another ideal fictitious person, and who is called the casual ejector, afterwards entered thereon and ousted the plaintiff, for which oufter the plaintiff brings this action. Under this declaration is written a notice, supposed to be written by this casual ejector, directed to the tenant in possession of the premisses; in which notice the cafual ejector informs the tenant of the action brought by the leffee, and affures him, that as he, the cafual ejector, has no title at all to the premiffes, he shall make no defence; and therefore he advises the tenant to appear in court at a certain time, and defend his own title, otherwise he, the casual ejector, will fuffer judgment to be had against him, by which the actual tenant will inevitably be turned out of possession.

The declaration is then served on the tenant in possession, with this friendly caution annexed to it, who has then an opportunity of defending his title; which if he omits to do in a limited time, he is supposed to have no right at all; and, upon judgment being had against the casual ejector, the real tenant

will be turned out of possession by the Sheriff.

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will f Up altered fictitio trial u A. B. now d his titl obtain **fuppos** fatisfac plainti Sheriff to app omina provin the end conditi broken lituatio of whi pals for out of been ha now be cution enant, ufual ru Of I

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#### Of the Action of EJECTMENT,

But if the Tenant applies to be made a defendant, it is allowed him upon this condition, that he enter into a rule of court to confess at the trial of the cause three of the sour requisites for the maintenance of the plaintiff's action, viz. the lease of the lessor, the entry of the plaintiff, and the outler by the tenant himself, who is now made defendant instead of the casual ejector; which requisites, as they are wholly sictitious, should the defendant put the plaintiff to prove, he must of course be nonsuited at the trial for want of evidence; but by such stipulated confession of lease, entry and outler, the trial

will stand upon the merits of the title only.

Upon this rule being entered into, the declaration is now altered by inserting the name of the Tenant instead of the fictitious name of the cafual ejector; and the cause goes to trial under the name of the fictitious leffee on the demise of A. B. (the leffor or person claiming title) against C. D. (the now defendant) and therein the leffor is bound to make out his title to the premisses, otherwise his nominal lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if he makes out his title in a fatisfactory manner, the judgment is given for the nominal plaintiff, and a writ of possession goes in his name to the Sheriff to deliver possession. But if the now defendant fails to appear at the trial, and to confess lease, entry and ouster, the uminal plaintiff must indeed be there nonsuited for want of proving these requisites; but judgment will nevertheless, in the end, be entered for him against the casual ejector; for the condition on which the tenant was admitted defendant is broken, and therefore the plaintiff is put again in the same ituation as if he never had appeared at all; the consequence of which we have feen would have been that judgment must pals for the plaintiff, and the tenant would have been turned put of possession. The same process therefore as would have been had, provided no conditional rule had been made, must now be purfued as foon as the condition is broken; but execution will be stayed if any landlord, after the default of his lenant, applies to be made a defendant, and enters into the usual rule to confess lease, entry and ouster.

Of recovering the mesne profits of the tenant, after the plaintiff has recovered possession by the action of ejectment.

Vide post.

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The confession of lease, entry and ouster, is sufficient in all cases, except in case of a fine with proclamations, in which case it is necessary to prove an actual entry; and the lessor of Vol. II.

#### Of the Action of EJECTMENT.

plaintiff directing one to deliver a declaration in ejectment to the tenant in possession, will not amount to such an entry. And by 4 & 5 Anne, c. 16. s. 16. no claim or entry shall be of force to avoid a fine levied with proclamations, or shall be sufficient within the stat. 21 Ja. 1. of limitations, unless the action be commenced within one year after making such entry or claim.—And note, the plaintiff must not lay his demise an-

Note also, that if A. enter on the premises in B.'s name, but without any authority or command from B. yet if B. afterwards and before the time when the demile is laid to be made, consents to A.'s entry, such subsequent consent is fufficient, Stra. J. 128, 10 . 57. traff .pol VV .ois

Of a certain place called the velley in D, a z-Lev. of. Of a rectory; of a chapel. Land, b2. and may be demanded by the name of a messuage, Saik 256. Sigh 101.

Of a cortage, I Lev. 58. Co. El. 818. Of a ttable.

17cs: 28"

Of a college, and of an orehard. Noy 37. Gro. El. 118. 854 1 Role Rep. 55. Gro. Jan. 655. Palm. 337. Hard. 55. 57. Ora Car. 555.
Of a garden, 1 Lev. 58. Golb. 6.

Of a boilery of falt. 1 Level 14.

Of a coal-mine. Cro. For 150, Nor 121, and in Durhim; of mines of coals, though not faid how many.t , Afhmed in error; the precedents for coal mines being to in that county. Carth. 227 4 whole 143. Comb. 2010 I Swall. 304. Salk. 255. Some the stand in the day on the lune

Of land, and a coal-mine in the fame land. Gran Youngs

For a pool, or flanding water. Tyle 14g 11 bill. t. kg. 227. And for a fiream, or running water, a luft 5. lid cont. Tele: 143. for it ought to be of so many acres of 

For a beath-gases stra, 1084, Andr. 106. 11, out over for so many acres of heibage. Hard, 303, 401, 0 mm For a first moving. Gra. Carrogoz.

For a hop-yard. Palm. 337 and the ...

Of a close, called D. containing three acres of land. Gro.

Ju. 435 - Palm. 102. 4 Mode 38 100 and at appen note for a parcel of a highway, and though it be built upon, thall be demanded as land. Bull Wi. Pri. op. cless to a

For twenty acres of furze and heath. Cro. far. 179. The Mid. 99. to tolici, ode bala de for touto m

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#### For what an EJECTMENT lies.

THE action of ejectment lies in B. R. by bill, and by briginal; but in C. B. by original only.

the attornies themselves, who may buy common forms of declarations in ejectment, with blanks, of the law stationers: if will be necellary to shew for what an ejectment may be

It lies of a manor, melluage, fo many acres of land, of

meadow, of pasture, of wood, &c. 11 Cb. 55.

Of a house. Cro. Jac. 654. Noy 37. 3 Lev. 97. Palm.

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337. Hard. 76, in the fecond flory of fuch a house. 3 Leon. Noy 109. Hard. 57. Of part of a house. Stra. 210. 695.

Of a certain place called the vestry in D. 3 Lev. 96. Of a rectory; of a chapel. Latch. 62. and may be demanded by the name of a messuage. Salk. 256. Styl. 101.

Of a cottage. 1 Lev. 58. Cro. El. 818. Of a stable.

1 Lev. 58.

Of a college, and of an orchard. Noy 37. Cro. El. 118. 854. 1 Rol. Rep. 55. Cro. Jac. 655. Palm. 337. Hard. 55. 57. Cro. Car. 555. Of a garden. 1 Lev. 58. Godb. 6.

Of a boilery of falt. 1 Lev. 114.

Of a coal-mine. Cro. Jac. 150. Noy 121. and in Durham, of mines of coals, though not faid how many. Affirmed in error; the precedents for coal mines being fo in that county. Carth. 227. 4 Mod. 143. Comb. 201. 1 Show. Salk. 255.

Of land, and a coal-mine in the same land. Cro. fac. 21. For a pool, or standing water. Yelv. 143. 1 Inft. 5. Reg. 227. And for a stream, or running water, 1 Inft. 5. fed cont. Yelv. 143. for it ought to be of so many acres of

land covered with water.

For a beaft-gate. Stra. 1084. Andr. 106. For so many acres of herbage. Hard. 303. 401. For a first mowing. Cro. Car. 362.

For a hop-yard. Palm. 337.

Of a close, called D. containing three acres of land. Cro. Jac. 435. Palm. 102. 4 Mod. 98.

So for a parcel of a highway, and though it be built upon, it shall be demanded as land. Bull. Ni. Pri. 99.

For twenty acres of furze and heath. Cro. Jac. 179. 1.

#### For what an Ejec TM ent lies

For fifty acres of furze and heath, and fifty acres of moor

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and marth. Burr. 4 pt. 2672. The saw is supposed and And faid per Ld. Mansfield in this case, that it has been determined, over and over, that fuch exact and precise certainty is not requisite in ejectment, as in pracipe's. A pracipe in a real action requires exactness and precision; but an ejectment is a fictitious action, contrived for ease, difpatch, and faving expence; and has of late times, been taken with more latitude than formerly of soil thomissed

For an alder car in Norfolk. Str. 1063.

For ten acres of wood, and ten acres of underwood. 2 For common of parties the server of the normand of the for common of parties the server of the serve

For the pasture of one hundred sheep. Hard. 52. Down on, and is not a part of the foil, as the herbage

For a piece of land called B. or a close of land called B.

For a messuage or burgage, for they are synonymous in a for of a croft. Style 20.

borough. R. Hard. 173.

For a melluage or tenement called the Black Swan. 3 Mod. 238. 1 Sid. 295. because certain enough for the theriff to

deliver possession.

So an ejectment lies for tyther; for although tythes are esteemed part of the incorporeal inheritance, and by the common law were only of ecclefiaftical conulance, yet being in the hands of lay-proprietors, are now confidered as a temporal effate; for, by 32 H. B. c. 7: it is provided, that every hay-person having any estate of inheritant, freehold, right, term, or interest, in tythes; and being thereof desserted, ousted, wronged, or otherwise kept from the fame, shall have his remedy, in the courts of laws for them, in like manner as for lands; and hence it is, that at ejectment lies for tythes. Vide Cro. Car. 301. Jones 31.

An ejectment lies for a rettory, because a rectory consist Salk 26 state Street the short base shall be recovered in ejectionent for an entirely, a morety may be recovered.

Ejectatent Jer . tive .cioics of . land, This remedy by the flatute is given only to lay impropriates; therefore the act of parliament leaves spiritual persons to purious their old remedy in the spiritual courts Co. Lithasgbally theriff might certainly know what to deliver upp. De of the

#### For what an Ejectment lies.

chapel, because it was res sacra, which was not demiseable; but now, since they are become lay-inheritances, they are recoverable in ejectment, as other lay estates; but it must be demanded by the name of a messuage, or it is not formal.

It Courses Style 101. Doc. Plac. 191. Salk. 256. pl. 7. But see 2 Stra. 914. 2 Barnard, K. B. 27. which seems contra.

Ejectment lies for a prebendal stall after collation to it. 1 Will. 14.

But an ejectment does not lie for a tenement. 2 Stra. 834.

Barnard, K. B. 155. being too indefinite a term.

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Nor for pannage, because this is no more than the fruit which falls from trees, which the swine have a right to feed on, and is not a part of the soil, as the herbage is. Lev. 212. Sid. 416. S. C. adjudged.

Nor for a rent or common appendant. Cro. Car. 292.

Cro. Fac. 146. of Infl. q. a. fed vide Stra. 71.

Nor of a fishery in such a river. Cro. Car. 492. Cro.

Nor of a croft. Style 30. But fee I Lev. 58.

Nor of a kitchen. Nor 409. Nor of a close, without specifying it. Godb 530 11 R. 55. Bridg. 56. 1 Roll. Rep.

Nor of arable or pasture land, without shewing how much of one, or how much of the other. Bridg. 56. Hard. 133.

Norfor a rod of land Gro. El. 339.

Nor of the fourth part of a meadow, without shewing

how many acres the mendow contains. I Lev. 213.

An ejectment for a messuage or tenement, without other description, bad for incertainty, Cro. El. 186. 3 Leon. 228. Pop. 197. 203. Noy 86. Cro. Jac. 125. Style 364. 1 Side 295. Cro. El. 116. March 96. 2 Rol. Abr.

So an ejectment for 100 acres of waste, or for an hundred acres of mountain, is bad for incertainty. Palm. 100. Hard.

57. Salke 255. 1 Show : 338 . . . . . . . . . . . .

In ejectment for an entirety, a moiety may be recovered.

Ejectment for five closes of land, arable and pasture, called long furlongs, containing ten acres, held ill; for the plaintiff ought to have shewn how many acres of arable land and how many acres of pasture, distinctly, so as the sheriff might certainly know what to deliver upon the habere

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#### For what an EJECTMENT lies

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facial poffeffionem. Carth. 204 ... Cro. Cor. \$73. 471. Hard. 59. Salk. 254. 1 Show. 338. 4 Med. 420 97 Comb. entry cannot in fact be made, no entry thall be supposed 801

Ejectment for a house, ten acres of land, and twenty acres of meadow by the name of a house, and ten acres of meadow. Verdict for plaintiff, but judgment arrested for repugnancy and incertainty. Yelv. 166. vot Nov. 143 notes with

Ejectment for a manor frould describe the quantity and species of land contained thereined Heth 146. Latch 61. Lit. Rep. 301 of calout of liw ron

So an ejectment for all and all manner of tythes in D. without faying or giving any other description of the nature and quality of the tythes, held naught. 11 Rep. 25. Moor. 837. pl. 1130. 1 Roll. Rep. 68. Palm. 101. Andr. 107.

Ejectment does not lie where no certainty appears, whereof

the sheriff can deliver possession. Mar. 96.

But it feems fufficient if so much certainty appears, upon which the sheriff can deliver possession, as ejectment for a parcel of land called B. or a close called B. Cro. Jac. 435. 3 Lev. 97. or a tenement called the Black Swan, &c.

An ejectment does not lie for a rent, or other things that lie merely in grant, because these, being incorporeal things, are in their nature invisible, que neque tangi nec videri poffunt; and therefore not in their nature capable of being delivered in execution. Co. Lit. q. a.

But the grantee of a rent charge, with power to enter and detain, quousque he be satisfied, has such an estate that he may demise it to a plaintiff in ejectment. I Saund. 112.

So may tenant by elegit, but he must prove the judgment, the elegit taken out upon it, and the inquisition and return thereupon, by which the land in question is assigned to him; and if by that it appears, that more than a moiety was extended, he cannot recover; for it would be ipfo fallo void, and not need a judgment, or audita querela, to avoid it. Salk. 560. Ld. Raym. 718.

So the conusee of a statute merchant may bring ejectment; but then he must prove a copy of the statute, and of the capias si laicus returned, and the extent returned, and the liberate returned; for though by the return of the extent, an interest is vested in the conusee, yet the actual possession of the interest is by the liberate. Salk. 563. Carth. 245.

Though the method of ejectment is now universally adopted in almost every case, to try the title to lands and tenements, being founded on the same principle as the ancient

#### For what an EJECTMENT lies.

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nt ts writs of affize, yet an ejectment is not an adequate means to try the title of all effates; for on those things, whereon an entry cannot in fact be made, no entry shall be supposed by any fiction of the parties. Therefore it is, that an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament; except for tythes in the hands of lay appropriators, by the express purview of the stat. 32 Hen. 8.4.37 which doctrine, hath since been extended, by analogy, to tythes in the hands of the clergy. Cro. Car. 301. Ld. Raym. 789. nor will it lie in such cases, where the entry of him that hath right is taken away by descent, discontinuance, twenty years dispossession, or otherwise.

and quality of the tythes, held naught. 11 Rep. 25. Macr. S. 7, p. 1130. I Roll. Rep. 58. Palm. 101. Under 107.

Liecture a does not be where no certainty appears, whereof the there it can deliver possession. Mar. 96.

But the mens sufficient if so much certainty appears, upon which the sheriff can deliver possession, as ejectiment for a parcel of land called B. or a close called B. Gro. Fac. 435 3 Love 97. or a tenement called the Black Swan, Sc.

An ejectiment does not lie for a rent, or other things that lie merely in grant, because these, being incorporeal things are in their nature invisible, and many and therefore not in their nature capable of being delivered in execution. G. L., 9, a.

But the grantee of a rent charge, with power to enter and detain, quantum to be failshed, has fuch an effate that he may densife it to a plaintiff in ejectment. I Saurid, 112.

So may tenant by 'sgi's but he must prove the judgment, the edget taken out upon it, and the inquisition and return thereupon, by which the land in question is assigned to him; and it by that it appears, that more shap a morety was exceptled, he cannot recovet; for it would be iffs fasts void; and not need a judgment, or mulija querela, to avoid it. Salt: 500- Let. Raym. 718.

So the connice of a flatiste merelant may bring ejectment, but aben he mult prove a copy of the flature, and of the capital proves a copy of the flature, and the liberate parameter, too though by the return of the extent; an interest, is velled in the canage, yet the adjual policition of the interest

is velted in the canality, yet the actual policition of the interest as by the district. Salt 563: Carth. 245.

I nough the method of pelment is now universally accept in almost every case to try the title to lands and tensurents, being founded on the same principle as the ancient write

#### Of the Demise in Electment

THE declaration in ejectment must shew a good denish.

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Also the lessor of the plaintiff must have a right of entry when this action is brought. And by the flatute of limitad tions, 21 fac. 1. c. 16. none shall make an entry into lands, but within twenty years after their right of title which shall first descend or accrue to them; but this act hath the usual favings for infants, feme coverts, &c. ad blued

The demife in the declaration must be laid after the title accrues, otherwise the plaintiff will be nonsuited; and the plaintiff must lay the commencement of his supposed lease, to have been precedent to the ejectment by the defendant.

1 Sid. 8.

If the lellor of the plaintiff If there be several lessors, and it is laid in the declaration that they demised, you must shew such a title in them, that

they could demile the whole. Cro. Fac. 166. and noque of

The demise was laid on the efforge day of the term, plaintiff had a verdict; and in arrest of judgment it was faid, that the effoign day is in law accounted the first day of term, and the demise being laid on that day, the ejectment was brought before plaintiff had a cause of action. But per cur. the action and the wrong may be on one and the fame day; and this being by original, may be fued out after the combe a flip, the defendant should have taken advantage of it on over. 3 Salk. 8.

In ejectment, on the demile of an heir by descent, the demise was laid on the day his ancestor died, and held to be

well enough.

ell enough. 3 Will. 274.

If lessors of plaintiff are tenants in common, there ought to be a different count on the demise of each tenant in common; or they may join in a lease [and if there are many it is the better way] to a third person; and that lessee make a lease to try the title. For tenants in common cannot make a joint 2 Wilf. 232. leafe.

So if there are several coheirs, each must make a lease. But joint-tenants are seized per my et per tout; and therefore

each may be faid to demise the whole.

So of coparceners, for they stand on the same foundation.

Vide Bull, Ni. Pri. 107.

Where a corporation aggregate is lessor of the plaintiff, they must give a letter of attorney to some person to enter and

#### Of the Demile in Eject Men't.

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nter and and feal a lease on the land; and therefore the plaintiff ought in such case, to declare upon a demise by deed; for they cannot enter and demise upon the land as natural persons can, though this will be aided after verdict. Carth. 390.

be good, without mentioning that it was by deed. Ld. Raym.

if Trustees of a charity want to bring ejectment, it seems, that the trustees, at the time of bringing the ejectment, should be the lessors of the plaintist; but besides the count on their demise, there should be another on the demise of the lessors (trustees) in the lease; another on the demise of all the then trustees, if more than were the lessors in the lease; and another on the demise of the receiver of the charity.

If the leffor of the plaintiff be an infant, the demise should be stated to be by deed, and also rendering rent; though there is no occasion in such case for a real lease,

So upon the demise of a master and fellows of a college, dean and chapter of a cathedral, master or guardian of an hospital, parson, vicar, or other ecclesiastical person, of any lands, &c. the declaration should state, that there was a rent reserved, &c. pursuant to the stat. 13 El. c. 10. R. Sov. 129.

Demise was laid in 1697, instead of 1696,—97 not being come at the time of the trial; and it was holden to be not amendable after verdict, because it would be another title; and the court will in no case (either before or after verdict) allow an amendment in the declaration, because in ejectment it is in nature of process. Stra. 1211.

well enough. 3 Will 374.

It less of plaintiff are tenents in comban, there ought to be a different count on the demise of each relant in common of they may join in a lease [and if there are many it is the better way] to a third person; and that lesse make a lease of try the title. For tenants in common cannot make a join asset. 3 Will, 222.

So if there are feveral coheirs, each must make a leafe.
But sount-temants are feized per my et per tout; and therefore
each may be faid to demile the whole.

So of coparceners, for they fland on the same foundation.

Where a substration degregate is lefter of the plaintiff, baff.

#### Of the Declaration in Execument.

The form of a declaration in ejectment on a lingle demile by bill in B. R. is as follows: The form of a declaration on

a impele Hilary term, in the 20th year of king George the third.

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rit. John Den complains of Richard Fen. Middlesex, to wit. being in the custody of the marshal of the Marshalsea of our fovereign lord the king, before the king bimfelf For that whereas William Smith, Efquire, on the fifth day of January, in the nineteenth year of the reign of our fovereign lord George, the now king of Great Britain, is. at Westminster, in the county of Middlesex, had demiled, granted, and to farm let to the faid John Den, four mef-fuages, four barns, four stables, fifty acres of land, fity acres of arable land, fifty acres of paffure land, twenty acres of wood, and twenty acres of underwood to describe the parcels according to the case] with the appurtenances, situate, lying, and being in the parish of Saint Mary, Issington, [the vill. or town where the premises lie] in the county aforesaid, to have and to hold the said premisses, with the appurtenances, from the faid fifth day of January, in the year aforesaid, for and unto the full end and term of sive years thence next enfuing, and fully to be compleat and ended; by virtue of which faid demise, he the faid film Den entered into the faid premises, with the appurtenances, and was possessed thereof, until the said Richard Fen afterwards, to wit, on the tenth day of January, in the nineteenth year aforesaid, with force and arms, &. entered on the premisses aforesaid, with the appurtenances, in the possession of the said John Den, and then and there ejected, drove out, and amoved the said John Den from his faid farm, his faid term therein not being yet ended: and him the faid John Den, so ejected, drove out and amoved, hath kept out, and still doth keep from his pelfession thereof, and other injuries to him then and there did, against the peace of our faid lord the king, and to the damage of the faid John Den of ten pounds, and theredamage of the laid Join Den, 38 ,till egnite and are

A. B. attorney for the plaintiff. and brol aging vol biat uso for the defendant, elat be instended and Tole

and therefore he brings funt, Pledges to profecute. and Richard Ros.

then

#### Of the Declaration in EJECTMENT!

Then subscribe the notice, the form of which fee here-

The form of a declaration on a fingle demise by original is as follows:

Hilary Term, in the 20th year of the reign of king George

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Middlefex. Richard Fen, late of the parish of St. Mary, Islantion, yeoman, was attached to answer John Den of a plea, wherefore with force and arms he entered into four methodges, four barns, &c. with the appurtenances, in the parish of St. Mary, Islington, which William Smith, Esq; demised to the said John Den for a term which is not yet expired, and ejected him from his faid farm, and other wrongs to him did, to the great damage of the faid John, and against the peace of our said sovereign lord the king. And whereupon the faid John Den, by William Lyon, his attorney, complains, that whereas the faid William Smith, on the first day of March, in the nineteenth year of the reign of our present sovereign lord the king, at Westminster, in the faid county of Middlefen, had demised to the faid John Don the faid tenements, with the appurtenances, to have and to hold to the faid John Den, and his affigns, the aforefaid tenements, with the appurtenances, from the faid but day of March, in the year aforesaid, unto the full end and term of five years thence next enfuing, and fully to be compleat and ended: by virtue of which faid demise, the faid John Den entered into the faid tenements, with the appurtenances, and was possessed thereof; and the said John Den, being so possessed thereof, he the said Richard Fen afterwards, to wit, on the second day of March, in the year aforesaid, with force and arms, &c. entered into and upon the faid tenements, with the appurtenances, which the faid William Smith had demised to the faid John Den as aforesaid, for the term aforesaid, which is not yet expired, and ejected the faid John Den from his faid farm, and other wrongs to him then and there did, to the great damage of the said John Den, and against the peace of our faid fovereign lord the king; whereupon the faid John Den faith, that he is injured, and hath damage to the value of 201. and therefore he brings fuit, &c. of thedges to profecuters in and

#### Of the Declaration in ETECTMENT.

For other forms of declarations, fee the various books

The notice to be written under the declaration is in the following form in some To Mr. John Bull has green

I am informed, that you are in polletion, or claim title to the premisses, in this declaration of ejectment mentioned of to fome part thereof ; and I being fued in this action as cafual ejector, and having no claim on title to the fame premifies, do advise you to appear on the first day of nex Eafter term, in his Majesty's court of King's Bench for corney of that court; and then and there, by rule of the of fame court, to cause yourself to be made defendant in my flead, otherwise I shall suffer judgment to be entered si against me, and you will be turned out of possession.

weightend, brind the first declaration,

The 1/ day of Fel truos sint to of bruary, 1780,000 and the one no noise look Richard Fin.

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ration delivered, only in the defendant's name. And a rule did as a notice of the same of scribed by the nominal plaintiff instead of the casual ejector, which the court held bad, and discharged the rule for judgment. Same case in B. R. Hil. 2 Geo. 2. Barnes, 172.

The notice in ejectment was to appear on the effoign-day of the term, and held ill; for it should be to appear the first day in full term, which is the first day in term. Stra. 1049.

13. R.

If the premisses lie in London or Middlefex, make the notice to appear on the first day of the next term to that of which the declaration is entitled; otherwise, if made generally, the tenant will have the whole of the next term to appear in.

any other county, the notice for the beginning of the should be to appear the next next term, or the next term

term generally.

C. 15. The same in this court.

But if the premisses lie in The notice may be either generally.

As many copies of the declaration must be made out on treble penny stamped paper, as there are tenants in possession of

#### Of the Declaration in EJECTMENT.

the premisses which the plaintiff claims; and each declaranon must be personally served on the tenant, or his wife, beone the effoign-day of the term wherein he is to appear, following. Barnes, 172, And the notice must be read over

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on the delivery, and fully explained. hal ejector, and afterwards delivered to the tenant in poffefhon, was laid of the fecond of June, to commence from Ladybefore ? and after the tenant in polletion had entered into common rule, in the declaration in the iffue delivered to the defendant, the demife was laid to be of the second of Anfollowing; the fitle of the leffor of the plaintiff being for a breach of a condition for nonpayment of rent due at Midfummer. And on motion that the iffue might be made according to the declaration delivered to the tenant in poskmon, because plaintiff ought not to recover upon a title accrued subsequent to the delivery of the first declaration, per tot Cur. By the course of this court there can be no alteration in the declaration in the iffue, from the first declaration delivered, only in the defendant's name. And a rule was made, that the iffue should be made according to the deduration delivered against the cafual ejector. Bost v. Bradfird B. R. Ed. Raym. 1411; bed blan timos ment. Same cafe in B. R.

Sarnes, 172. The notice in ejectment was to appear on the efficiending of the term, and held ill, for it should be to appear the first day in full term, which is the first day in term. Smi

C. B. I he fame in this court.

B. R. it the premifies lie in Landen or Middlefex, make the motice to appear on the first day of the next term to that of which the declaration is entitled; otherwife, if made generally, the tenant will have the whole of the next. eximito appear in-

But if the premifles lie in The notice may be either refrie any other county, the notice for the beginning of the satt ? · thould be to appear the next, next, term, or the next term must:

stern generally. generally. 10 the many copies of the declaration must be made out on no tu

#### Of the Delivery of the Declaration in ETECT. MENT.

A Copy of the declaration, and notice thereon, must be de livered personally to the tenant or his wife, to whom, at the time of delivery, the notice should be read over, or an account given of the contents and meaning thereof. A W AOD

The service may be on the tenant himself in any place of the premisses; but if it be on the wife or fervant, it must be on the premisses; and if it be on the servant, there must be fome acknowledgment by the tenant of having received in

A delivery to his fon, daughter, or fervant, the tenant being abroad, or out of the way, is not a good delivery, unless it evidently appears to the court, that such declaration and ne tice came to his hands before the efforen-day of the term; and that on receipt thereof, he very well understood the contents and meaning of the notice; and in fuch case it has been held a good deliveryor Salkr 2250 pt. 5.09 a inquord on tall

The tenant in possession acknowledged the receipt of a declaration in ejectment on a Sunday, which, before the offoign-day, had been delivered to his daughter, and the made acquainted of the contents. 2 Barnes, 148. But q. for i declaration in ejectment is in the nature of process, and no process shall be served on a Sunday, by the state 29 Car. 2. 6. 7. f. 6. Though the delivery of a declaration, in another action, on a Sunday, had been held good; but that is not process.

Upon affidavit that they had tendered a declaration in ejectment, and that the servants refused to call their master, or receive it, faying, they had orders to take no papers; it was ordered, that leaving it at the house should be sufficient.

The declaration was tendered to the tenant in possession, who refused it; whereupon it was left on the floor in his prefence; and he entering into a parlour, and flutting the door, the person who so tendered and left the declaration, read the notice aloud, so that the tenant might hear it; and this was held good fervice. Barnes, 185. anothollog

The tenant fecreted himself in the house, so that he could not be personally served; whereupon, on motion for a rule to thew cause why service of it on the servant should not be good, the court ordered the rule to be ferved in that manner.

The wife of the tenant in possession, on a person's knocking at the door of the house in order to serve the declaration, opened a wicket in the door, and looked through it, and was then acquainted with the contents of the declara-

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### Of the Delivery of the Declaration in Eject-

tion, and the English subscription was read to her; and immediately after, and before the declaration could be tendered to her, she shut the wicket; whereupon the declaration was fixed upon the door, as by affidavit appeared; and have sworn, that the tenant in possession afterwards acknowledged the receipt of the declaration on the day it was tendered to his wife and fixed upon the door; the service was held insufficient; because the tenant's acknowledgment that he received the declaration is not enough. An actual delivery, or tender, and refusal, ought either to be proved or

confessed. Barnes, 171.

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On motion for judgment, upon an affidavit, that tenant in possession refused to accept the declaration when tendered to him; that he was acquainted with the contents; and that he brought a gun, and swore he would shoot the person who tendered the declaration, if he did not get off his land; whereupon the declaration was laid down on the ground in the presence of desendant and his man, whom defendant ordered not to take it up, the court were of opinion, that these circumstances amounted to good service, and made a rule for judgment. Per cur. It is the same thing as a continual claim, where the party comes as near the land as he can to make his claim, for fear of his life. Barnes, 174.

The affidavit of service of declaration was, that deponent did serve the wives of A. and B. who, or one of them, are trants in possession, &c. the court refused to make a rule for

judgment; the affidavit is defective. Ibid.

Service of ejectment at the house may be made good by a

subsequent rule of court. I Blacks. Rep. 290.

Service of a declaration in ejectment on the wife of the tenant in possession, is good service. 2 Blacks. Rep. 800.

On motion for judgment against the casual ejector, upon an affidavit, that the declaration was tendered to the wise of the tenant in possession, who refused to open the door of the house, but looked out of a parlour window, and was acquainted with the contents; and the subscription was read to her, after which, she resusing to accept the declaration, it was put in at the window to her. The service was held sufficient. Barnes, 178.

The declaration was tendered to the wife of the tenant in polletion, upon the premises; she was acquainted with the contents thereof, and of the subscription, through a win-

sion,

dow,

#### Of the Delivery of the Declaration in Elect. MENT

dow, which the refused to open, or receive the declaration: and thereupon the declaration was left upon the outfide ledge of the window. The person who tendered the declar ration fwore, that he heard the woman's voice diffincly through the window, and was well affured the heard what he faid, by the answers she gave him; the service was held fufficient, and the common rule for judgment was made Barnes, 1800 i berred the rule to be ferved ino81 . served

A declaration in ejectment served on the church-wardens and overleers of a parish, who rented a house for harbouring fome of the parish poor, and did not otherwise occupy the house than by placing the poor in it, deemed sufficient fervice, and a rule made for judgment. Barnes, 181. it in the

The declaration was left with the father of the tenant in possession, with the usual subscription, and he was acquainted with the contents; after which, and before the efforga-day the tenant acknowledged the receipt of it. Held fufficients Barnes, 176. hould be good fervice thereof.

Affidavit of service of declaration on the wife of tenant in possession, as the informed deponent, and as he verily believes ; held fufficient. v. Barnes, 104. thought saw inombe

The tenant secreting himself, so that he could not be ferved, the declaration was delivered to the daughter, who kept the house, and she made acquainted with the contents A rule was made for the tenant to flew cause, why such former service should not be deemed good. The rule to be

ferved on the daughter at the house. Barnes, 192 dw radion On affidavit, that one of the tenants is a lunatic, and that one C. lives with her, transacts her business, and has the fole conduct thereof, and of her person, but would not permit the deponent to have access to her, in order to serve her with the declaration; whereupon, he delivered it to the faid C. and a rule was made for the lunatic and C. both to thew cause, why such service should not be good ; and fervice of the rule on the faid C. to be good. Barnes, 190.

On affidavit, that the tenant absconded to avoid being ferved, and that the came into the polletion furreptitionly and of fervice of the declaration on her son, who is her ser out want, manages her affairs, and lives in her family, a rule was made to shew cause, why such service should not be good pleasa and leaving a copy of the rule at her house to be good serand leaving a copy of the rule at her house to be good set-Barnes, 190. vice of the rule.

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#### Of the Delivery of the Declaration in E tecta MENT.

It appearing by affidavit, that one Go the tenant in pofeffion and his wife, had both absconded; and could not either of them be ferved with a declaration; and that they had left a woman fervant in the house on the premisses, in whole prefence a declaration was fixed up the court made alfule on the tenant, to thew cause, why fervice of a deal claration on his fervant, at his house, should not be deemed good fervice, and directed the rule to be ferved in that man-A declaration in ejectment lerved on thy 88 westerner deepen

The tenant in pollestion absconded, and on affidavit thereof, the court ordered that fervice of the declaration pon his niece, the only manager of the house, and refident in it, and fixing up another copy on the premisses, should be good pland made a rule to shew cause, why judgment hould not be entered up against the casual ejector. And ordered that service of this rule, on any person in the house. and if no person there, then fixing the same on the door, hould be good service thereof. Burr. Rep. 4 pt. 1116.

The tenant, an unmarried man, absconded, leaving a ervant in the house; to recever the possession, whereof this edment was brought. Plaintiff moved for judgment upon befervant, and another copy was affixed on the street door; within the 4 Geo. 2. ad made a rule accordingly in Barnes, 173. ban zaw shur A

The terrant was personated at the time of the service, by nother who accepted the fervice in the name of the tenant; ad the court made a rule to flew cause, why it should not deemed good fervice upon the tenant himself; and why dement fhould not be figned against the casual ejector, default of his appearing; and that leaving a copy of this ale at his house, with some person there, or if no one to emet with, affixing it on the door, should be good service ereof. Which rule was made absolute on a proper affidafervice of the rule on the faid C. to be 1874 . 164 reu800.11

When the tenant is ferved with the declaration, a copy the declaration must be made out on stamps, to annex oun affidavit of fervice of the declaration on the tenant, was reder to move for judgment on default of the tenant's good, pearancelon Which affidavid must be to the following less the boog of or shoot and as short and to you a grower bas

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vice of the rule. Barnes, 190

Of the Delivery of the Declaration in Eject. MENT.

In the King's Bench.

John Den, on the demise of William Smith, plaintiff, against Richard Fen, defendant.

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A. B. of, &c. gentleman, maketh oath, that he this deponent, did, on the day of last past, deliver to Mr. John Bull, the tenant, in possession of the premisses in the declaration hereunto annexed mentioned, or of some part thereof, a true copy of the faid declaration, and of the notice thereunder written; and did at the fame time inform him the faid John Bull, that it was a declara-tion in ejectment; and that unless he appeared by some attorney in this court, on the first day of this present Easter term, and cause himself, by rule of court, to be made defendant, in the room of the casual ejector, Richard Fen, judgment would be entered against the casual ejector by default; and that he the faid John Bull would thereupon be turned out of possession, or words to that effect.

Sworn, &c. vab ngiola adrarbled berevilet ad no. A. B.

This affidavit must be positive, that the tenant is tenant

in possession.

On motion against the casual ejector, the affidavit set out, that deponent did serve A. B. tenant in possession, or C. his , wife, the court faid, it was not certain as to either, and made no rule. Barnes, 173. reages of estation and gridoon

The common grachee of the court is, to receive motions

tiudement against the casual eletter with Er. after the Im is ended; and then, upon the common rule, the new

tendant has no opportunity to plead to the jurisdiction, or

But in C. B. in fuch cafe, by Reg. 32 Car. 2. "The Thirst first?"

all take nothing by his motion for judgment, against the level of sales, for detault of appearance up to the necktor be conforthin one week next after the field by of every distances.

more for leave to to do -But the court, on motion, will re leave to plead to the juritarction in ejectment. But O. the motion ought not to be, "Tent the found in a filling, harmade des lendonts, may have leave. See V de 1 Blacks Rep 10

robing the for default of appenrances until middle within one week next after the first day of the first and within and every Easter term and within ab first day of every Eastery and Trigger within a first and the state of the

#### Of Judgment against the CASUAL EJECTOR.

ON an affidavit of service and default of the tenant's appearance, you move for judgment against the cafual gettor; which affidavit is delivered over to the clerk of the rules in B. R. or secondary in C. B. when the motion is made to be filed; and then you draw up the rule, with the clerk of the rules in B. R. or secondary in C. B.

If the premisses lie in London or Middlesex, and the notice

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be to appear the first day of the next term, move for this rule the beginning of the term, and then the tenant has four by inclusive next after the motion to appear in \*; but if the motion is made late in term, the court will not allow him more than one or two days; and will fometimes order he tenant to appear immediately, so that the plaintiff may table to give notice of trial within the term. But if the notion is not made before the four last days of the term, he tenant will then have, by the rule, until two days efore the essoign day of the subsequent term, to appear. but if the notice be to appear generally, then the tenant in the whole term to appear in. And if the tenements lie n any other county than London or Middlefex, though the eclaration be delivered before the effoign day of Eafter or Michaelmas terms, yet the tenant has till four days before he next issuable term, i.e. either Trinity or Hilary, to aphear in. In C. B. till within four days exclusive, after the next habit term. And if the premisses are in one of the northern ounties, or where the affizes are held but once a year, the thant has till four days next after the end of the term, receding the affizes, to appear.

The common practice of the court is, to receive motions In the common practice of the court is, to receive motions or judgment against the casual ejector nist, &c. after the term is ended; and then, upon the common rule, the new established that has no opportunity to plead to the jurisdiction, or o move for leave so to do.—But the court, on motion, will live leave to plead to the jurisdiction in ejectment. But Q. it the motion ought not to be, "That the tenant in possession, when made defendant, may have leave, &c. Vide i Blacks. Rep. 197.

But in C. B. in such case, by Reg. 32 Car. 2. " The plaintiff But in C. B. in such case, by Reg. 32 Car. 2. The plantal state nothing by his motion for judgment, against the casual billow, for default of appearance, unless the motion be made within one week next after the first day of every Michaelmas tm, and every Easter term; and within four days after the state of the day of every Hilary and Trinity term.

#### Of Judgment against the CASUAL EJECTOR,

The rule for judgment against the casual ejector is drawn out in the following manner in the respective courts:

In 15. 1R.

Saturday next, after eight days of the purification of the bleffed virgin Mary, in the twentieth year of the reign of king George the third,

Den on the demise of Bull, the tenant Smith, Esq; in possession of the premission of the premission, shall appear and plead to issue on Thursday next, after the end of the term, let judgment be entered for the plaintist, against the now defendant Fen, by default. And in the mean time proceedings to stay, upon the motion of Mr. Bond.

Let the rule be entered

By the court.

In C. 13.

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Hilary, the twentieth of king George the third.

Den against Fen, the ca-fual ejector. Twelfih day of the affidavit of John Thomas, gent. it is ordered, That unless John Bull, tenant in pollellion of the tenements in question, or any other person concerned in the title thereof, on Satur. day next, shall appear by an attorney of this court, who shall then forthwith receive a declaration, and plead thereto the general iffue, and confent to the common rule for confessing lease, entry, and ouster, upon the trial to be Let judgment against the casual ejector be entered, and in the mean time proceedings are to flay upon the motion of Mr. Serjean Walker.

By the court.

Fothergill.

By Reg. Hil. 2 Geo. 2. in C. B. No declaration in eject ment shall be taken or received by the fecondary, unle figned by some serjeant at law, and delivered by himself a the secondary in open court.

And by the fame rule, the fecondary shall, the mornin next after the end of every term, and at all other time when required, shew to any other person, who shall deman the same, his alphabetical paper of ejectments, moved delivered into court in each term.

TO prevent fraudulent recoveries of the possession, by collusion with the tenant of the land, all tenants are obliged by the statute 11 Geo. 2. c. 19. s. 12. to give notice to their landlords, of a declaration in ejectment being delivered, under pain of sorfeiting three years improved or rack rent

of the premisses so held and enjoyed by the tenant.

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And as the tenant in pollession could not be compelled to appear and enter into the common rule, to become desendant instead of the casual ejector; so neither could the andlord alone, without joining with the tenant, enter into fuch rule, and be made fole defendant. But to remedy this inconvenience, by fect. 13. of the same statute, it is enacted, "That it may be lawful for the court where " such ejectment shall be brought, to suffer the landlord to " make himself defendant, by joining with the tenant, in case he should appear; but in case such tenant shall neglect or refuse to appear, judgment shall be signed against the cajual ejector, for want of fuch appearance: but if the land-"lord, &c. of any part of the lands, &c. for which fuch ejectment was brought, shall defire to appear by himself, and confent to enter into the like rule, that by the course of the court, the tenant in possession, in case he or she had appeared, ought to have done; then the court, where such ejectment shall be brought, shall and may permit such landlord so to do; and order a stay of execution upon such judgment, against the casual ejector, until they " shall make further order therein."

Note: Under this act, no one but a landlord, can be made a defendant, Bull. Ni. Pri. 95. that is, a person who is in some degree of possession, as in receiving rent, or the like.

Therefore, where I. S. and M. his wife [who claimed title to part, of which F. and G. were tenants, and refused to appear] applied upon affidavit of the fact for leave to appear as to the said part; and it appearing that the lessors of plaintist claimed title as devisees under one will, and the said I. S. and M. as devisees under another will of the same Testator, and the question was, which should prevail; the court said, this motion is founded on the act 11 Geo. 2. and that they had no jurisdiction to admit any person to defend an ejectment, instead of the tenant, except the landbord only. And who is landlord within the act? not every person claiming title, but one who is in some degree of possession, as receiving rent, &c. The clause of forseiture by the tenant, if he does not give notice of the declaration to his landlord, proves this. Roe

N 3

ex dem. Leake v. Doe, Mich. 29 Geo. 2. C. B. Barnes,

193.

In like manner a mortgagee, who was not in possession, and had never received the rents, was refused to be admitted a defendant with the tenant. Jones ex dem. Woodward v. Williams. Tr. 15 Geo. 2.

But a lord claiming by escheat, was admitted to defend,

Burr. Rep. 4 pt. 1296.

Observe this statute 11 Geo. 2. provides, that the landlord may make himself a defendant in ejectment, when the tenant refuses to appear. And though judgment is figued against the casual ejector, the court shall order a stay of execution, until they make further order therein. Under this clause, the landlord appeared without the tenant, and after a verdict for plaintiff, he brought a writ of error, upon which plaintiff moved to take out execution, which the court refused to grant: for though it is left to their discretion, yet that can only be a legal one. The act intended to put the landlord in the place of the tenant, that he should not be stripped by any act of the tenant; and it ought to be confidered as if the tenant had brought error, which would undoubtedly be The court cannot take upon them to judge, a supersedeas. whether there is error in the proceedings or not. Jones v. Stra. 1241. Edwards.

Like motion denied in C. B. Bernes, 208.

When the rule to plead is out, and no plea and rule left by the tenant, for which you must fearch all the judges books in B. R. if the ejectment is by bill; and if by original, the Filazer's office [or if in C. B. the prothonotary's plea-book;] you ingross your declaration on a double half-crown stamp; and on the roll draw up the rule against the casual ejector, for judgment, and then carry the same to the clerk of the judgments if in B. R. who, on producing the rule, will sign the judgment, for which you pay 3s. 6d. or if in C. B. it must be carried to the prothonotary, who will sign the judgment; and then you enter up the judgment by nil dicit on the roll, and then take out an habere facias possessing.

Note: If judgment is figned against the casual ejector, without the tenant of the premisses coming in to defend, execution cannot be taken out to turn the tenant out of possession, without leave of the court on motion; on which

a rule to thew cause will be granted.

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An attorney cannot appear for the tenant in possession in

ejectment, by order of the landlord. Barnes, 39.

But if the tenant has refused to appear, and the landlord, according to the 11 Geo. 2. c. 19. would wish to defend, he must apply to the court for that purpose, on an affidavit of the tenant's refusal; and a copy of the rule for that purpose, when obtained of the clerk of the rules in B. R. or secondary in C. B. must be annexed to the plea and consent rule.

The affidavit of the tenant's refusing to defend an ejectment, in order to have the landlord admitted defendant, is

as follows:

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Between William Smith, plain

Between Sold Pen on the demise of William Smith, plaintiff, and Richard Fen, defendant.

A. B. of, &c. maketh oath, that he this deponent, did, on day of last, by the direction of Thomas Hodgson, esquire, landlord of the premisses in question, in this cause to apply to John Bull, tenant in possession of the fame premisses, to know whether he the said John Bull would appear and become defendant in this cause; or would permit the faid Thomas Hodg fon to defend his title to the faid premisses, in the name of the faid John Bull; and this deponent, at the same time, shewed and offered to deliver to the faid John Bull, a note, figned by the faid Thomas Hodgson, whereby the faid Thomas Hodgson promifed to defend and keep the faid John Buil of, from, and against all costs and charges in this cause; and the said John Bull told this deponent, that he would not appear and become defendant in this cause, or any way concern himfelf therein.

Sworh, &c.

A. B.

Upon this affidavit, the landlord may appear and defend in like manner as the tenant might have done; and the

method of appearing is as follows:

If the tenant or landlord appears, his attorney gets a blank confent rule from a stationer, unstamped, or from the fecondary in C. B. then fills it up, making the tenant or landlord defendant, instead of the casual ejector, entitling the cause in the margin, and inserting the premisses, as described N 4

in the declaration, or such part thereof as the party would wish to defend; then the attorney for the defendant figns his name at the bottom, leaving a blank space for the plain. tiff's attorney to do the like, [for this is rather an agree. ment between the parties, than the rule itself, which is drawn out by the officer and engroffes the general iffue on flamp. ed paper, and afterwards annexes the fame to the rule; Sand if there is a rule to admit the landlord defendant, the tenant having refused, annex that also] then file common bail, if by bill in B. R. with the clerk of the common bails; and if by original in B. R. enter the appearance with the Filazer, who will mark it; or if in C. B. enter appearance with the proper Filazer, who will stamp the rule; which being done there, if the proceedings are in B. R. you carry and leave this rule, &c. at any of the judges chambers; of if in C. B. you carry and leave the fame with the prothonotary.

The appearance in ejectment should be entered of the term mentioned in the notice. And where the notice to appear was in *Hilary*, and the tenant entered an appearance in Michaelmas following, and did nothing farther, and plaintiff finding no appearance of *Hilary*, and no common rule entered into or pleaded, figned judgment against the casual ejector, the court held it regular. But afterwards set it aside

to try the merits. Barnes, 250.

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The form of the confent rule in B. R. is as follows:

Michaelmas term, in the twentieth year of king George the third.

Middlefex. messuages, four barns, or Middlefex.

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Den, on the It is ordered, by consent of the demise of Smith, of four attornies of both parties, that John Bull [the tenant or landfour stables, fifty acres of lord, as the case is ] be made deland, fifty acres of ara- fendant, in the stead of the now ble, fifty acres of pasture, defendant Richard Fen, and do twenty acres of wood, cappear forthwith at the fuit of and twenty acres of un- the plaintiff, and file common bail, derwood, with the ap- [if by original, leave out these purtenances, fituate in words and receive a declaration the parish of St. Mary, in an action of trespass and eject-Islington, in the county | ment, for the premisses in question this cause, and forthwith in plead thereto, not guilty; and

upon the trial of the issue, confess lease, entry, and ouster, and infift upon the title only; otherwise, let judgment be entered for the plaintiff, against the now defendant Richard Fen, by default; and if, upon the trial of the issue, the faid John Bull, shall not confess lease, entry, and ouster, whereby the plaintiff shall not be able further to prosecute his bill [or if by original, his writ] against the said John Bull, then no costs shall be allowed for not profecuting the same; but the said John Bull shall pay costs to the plain-tiff in that case, to be taxed. And it is surther ordered, that if upon the trial of the faid iffue, a verdict should be given for the faid John Bull, or it shall happen, that the plaintiff shall not further prosecute his faid bill [or writ,] for any other cause than for not confessing lease, entry, and ouster, then the lessor of the plaintiff, shall pay to the said John Bull his costs in that behalf to be adjudged

By the court.

O. P. for the leffor of the laintiff. I. M. for the defendant.

The form of the consent rule in C. B. is as follows:

Michaelmas term, in the twentieth year of king George the Third.

Middlefex, to wit. Den against Fen, for four mefin the county of Middleliam Smith.

It is ordered, by confent of O. P. attorney for the plaintiff, and fuages, four barns, four I. M. attorney for John Bull, stables, &c. with the ap- | who claims title to the premisses purtenances, in the parish sin question, that the said John of St. Mary, Islington, Bull shall be admitted defendant; and that the faid John Bull shall fex, on the demise of Wil- immediately appear by his said attorney, who shall receive a declaration, and plead thereto

the general iffue this term; and at the trial to be had thereon, shall appear in his proper person, or by his counsel or attorney, and confess the lease, entry, and ouster, of so much of the tenements specified in the plaintiff's declaration, as are in the possession of the said defendant, or his tenants, or any perfons claiming by or under his title; or that in default thereof, judgment shall be thereupon entered against the defendant Richard Fen, the casual ejector; but proceedings shall be stayed against him, until default shall be made in any of the premisses: And by the like consent, it is fur. ther ordered, that if, by reason of any such default, the plaintiff shall happen to be nonfuited upon the trial, the faid John Bull shall take notice thereof, and shall thereupon pay to the plaintiff, costs to be taxed by the Prothonotary. And it is further ordered, that the lessor of the plaintiff shall be liable to the payment of costs to the said John Bull, by the count here to be in any manner allowed or adjudged

might be made detendants without did tenent in positive as

By the court,

O. P. attorney for the plaintiff, Ton one of de rotted who of I. M. for the defendant, the profits, without an actual obstruction of

crops. Wigfull v. Bryden Fuff 6 Cie. 3

In he whole profits, is no ejectment. Co. L. 100 leading a nine of the whole land? Salk. 286. Not the land. the w ing a inting to have the rents raifed. " Car, K. B. tierfentin A tenant is not obliged to appear in cir cums though At Of landlord is ready to indefinity him, between the landlords, end of the lar

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If the defendant enters into the common rule, to confess lease, entry, and ouster, for a part of the premisses only, his attorney should give notice to the plaintiff's attorney, of what premisses he means to defend in this manner:

In the King's Bench, Den, on the demise of Smith or Common Pleas. Fen.

Sir,

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Take notice, that I defend for a messuage or tenement, a garden and stable, [specifying the particular premisses], situate in the parish of St. Mary, Islington, now in the possession of the said John Bull, or his under-tenant.

Dated this day of 1780

Your's, &c.

I. M. defendant's attorney,

To Mr. O. P. plaintiff's attorney.

If there be several persons who claim title, the rule may be drawn generally or specially. Generally, as that J. S. who claims title to the premisses in question in his possession should be admitted desendant for such messuages; and this puts a necessity on the plaintist to distinguish, by proof, what tenements are in each tenant's possession, otherwise he can have no verdict;—but if the rule be drawn specially, that superfedes the necessity of proof that the lands are in his possession.

Note, If one tenant in common bring ejectment against another, there is no occasion to prove an actual entry and suffer, for that is confessed by the rule. But if the fact be, that there has been no actual ouster, the defendant ought to apply to the court not to compel him to confess, or to permit him to do it specially; which the court will grant, where it is only matter of account, and the only ouster is by pernancy of the profits, without an actual obstruction of the other to occupy. Wigfall v. Brydon. East. 6 Geo. 3.

In the case of joint tenants and tenants in common, receiving the whole profits, is no ejectment. Co. L. 199. b. nor levying a fine of the whole land. Salk, 286. Nor the not confenting to have the rents raised. Ca. K. B. 657.

A tenant is not obliged to appear in ejectment, though

the landlord is ready to indemnify him. Barnes, 173.

In C. B. it was moved, that the landlords, viz. A. B. and C, might be made defendants without the tenant in possession,

## Df Gjedment.

# Of appearing in Electment.

who refused to appear. But the motion was denied, and the common rule was made to add the landlords to the te-

nams in possession. Barnes, 172.

In ejectment, on demise of Stone and wife, Stone moved, that the conditional rule entered into by his wife, by the name of Anne Field, widow, might be fet afide, upon affidavits tending to prove the marriage between Stone and her; and obtained a rule to shew cause. On shewing cause, Anne Field produced affidavits to thew a long cohabitation between her and the late Counsellor Field, as husband and wife; that he had a child by her, and devised the estate in question to her, by the name of his wife; that Stone was married to and lived with another wife. The court thought the validity of Stone's pretended marriage to Field a fit matter to be tried, and (the tenants having confented to appear) fet aside the judgment figned against the casual ejector, for want of their appearance, and ordered Field, the landlady, to be added a defendant to the tenants; whereby Stone was fecured if the plaintiff recovered in his costs. Barnes, 189. 1 9 and 1d and

Motion, that Mr. P. who claimed title, might be made defendant, instead of the late tenant, who quitted possession,

denied. Barnes, 175 things them but store is well of

In ejectment, the court denied to let the Parson of Hampflead chapel defend only for a right to enter and persorm divine service, notwithstanding the case in Salk. 256. saying it had been often denied since: Martin v. Davis. Stra. 914.

Motion on affidavit, that the tenant in possession was a material witness for the landlord; that therefore the landlord might be made a desendant, in the room of the tenant in possession, objected; that it was never done, and it would not make him a witness when done. And per cur. He is liable for the mesne profits. The declaration is regularly delivered to the tenant in possession. It was never done in this court. Bourne v. Turner. Stra. 632.

A motion was made on behalf of the tenant in possession against D. an attorney, for appearing and pleading for him without authority. It appeared, that the tenant in possession was tenant at will to infants; by order of whose guardian D. had appeared, and pleaded for the tenant, and offered the tenant security to indemnify him. But per cur. a defence cannot be made for the tenant without his consent; let the appearance and plea be withdrawn. Barnes, 39.

In C. B. the agents for the tenants in pollession entered their appearance with the Filazer, and sent a note to plaintist's

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agent that defendants plead not guilty. Plaintiff's agent figned judgment for want of a plea in form. The counsel for the tenants submitted to the court, that according to the words of the rule for judgment against the casual ejector, unless the tenants appear, a new declaration against the tenants should in strictness have been delivered before a plea in form could be required. Judgment set aside, with costs. Barnes,

On motion for the landlord to defend upon the statute of 11 Geo. 2. the court objected, that this motion could not properly be made till after judgment signed against the canal ejector; and that an affidavit ought to be produced of the tenant's refusal or neglect to appear. To which it was answered, that after judgment signed against the casual ejector, the plaintist might take possession. But the court held the affidavit to be necessary, and made no rule; declaring, that the intent of signing judgment against the casual ejector was only that the plaintist, after having tried his cause against the landlord, (the tenant not being a party) might have the benefit of his verdict, and take possession under the judgment, which, under such verdict he could not. It seems reasonable (upon a proper affidavit) to grant a rule

to shew cause, before judgment against the casual ejector can

be figned, to prevent the ill consequences of taking possession

immediately after Barnes, 179.1 v no banto The tenants had the forenoon of the 29th of April, in Easter term, to appear in. F. the landlord, moved to add himself to the tenants; but no appearance being entered, plaintiff, on the 30th, figned judgment against the casual ejector. The landlord afterwards, without disclosing to the court what had been previously done, applied for the conditional rule as a matter of course; and by virtue thereof, on the Ist of May, appeared alone without the tenants. Plaintill moved to take out execution on the judgment, and on shewing cause, the judgment appeared to be regular, and the appearance out of time. Plaintiff offered to waive his judgment, if the landlord, who resided at Jamaica, would give fecunty for costs; to which his counsel not consenting, the court made the rule absolute for leave to take out execution. Barnes, on 86 and the tenant, ab810 fremme

It was moved on the statute 11 Geo. 2, that the landlord might be added desendant to C. D. one of his tenants, who appeared to desend the premisses in his possession; and that as to the residue of the premisses contained in the declaration,

he r appearance with the Filozers and fent a note to plant

in the possession of T. M. another tenant, who refused to appear, (as per affidavit) the landlord might appear, and defend fingly; ruled accordingly, and that the plaintiff might fign judgment against the casual ejector, as to the tene. ments in possession of T. M. but that the writ of bab. fac.

poff. be stayed till further orders. Barnes, 179.

A regular judgment had been fairly obtained against the cafual ejector, the tenant having neglected to give notice to his landlord; for which reason the landlord moved to set aside the judgment. The landlord was an infant, and therefore could not consent to any issue. The court held, that the poffession ought not to be changed where there had been no trial, nor opportunity of trying; and ordered, that the tenant in polletion should pay the costs; that the regular judgment, and writ of poffession should be set aside; that the landlord be made defendant, and not to fet up any fatisfied term or trust estate; and to admit that Z. T. was seized, Burr. Rep. 4 pt. 1996.

Where the landlord is made defendant, the plaintiff must prove the landlord tenant in possession of the premisses in question. 1 Will. 220.

A landlord was made defendant, according to the 11 Geo. 2. c. 19. f. 13. on the tenant's non-appearance, and entering into the common rule; and thereupon a stay of execution was ordered, until the court should make further order. Burr. Rep. 4 pt. 757.

If a writ of error is brought by the landlord, it is a fuffi-

cient reason against taking out execution. Ibid.

But the proper opportunity for the landlord to make his frand against the execution, is by shewing this as cause against the plaintiff's motion for leave to take it out. Ibid. And if he omits this opportunity, the execution regularly issued shall not be fet aside. Ibid.

A landlord made defendant without his tenant, may bring

error and stay execution. Stra. 1241.

The landlord had applied to be made a defendant, and had entered into the common rule; but the leffor of plaintiff had not joined in the confent rule; and on motion to fet aside a rule to reply, (as he could not be forced to proceed against a person whom he had never accepted as defendant) the court held the rule to be regular, and that the nominal plaintiff might be nonproffed thereby; but being nominal, the defendant could have no costs. 2 Blackstone, Rep. 763. In

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In C. B. the plea of Marshal and others, landladies and tenants in possession, who had appeared with the Filazer, and entered into the common rule, was left in the Prothonotary's office, entitled with the true name of the cause; but by mistake in the body of the plea, the name of plaintist's lessor was inserted (as the person complaining) instead of that of the nominal plaintist. Plaintist's attorney looking upon this plea as null and void, signed judgment against the casual ejector; which judgment was set aside, with costs, as irregular; the plea is properly entitled, and not a nullity. Barnes, 191.

In C. B. the declaration was delivered to the tenant in pollession, without any Prothonotary's name set thereon. Upon assidavit of service, the court made a rule for the tenant to shew cause why, upon notice of the Prothonotary's office, judgment should not be entered against the casual ejector, unless he (the tenant) appeared within the usual time; which rule, on affidavit of service, was made absolute.

Barnes, 192.

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Motion was made to make the lessor of the plaintist's wife adefendant in ejectment, the plaintist's title being by a pretended intermarriage, which was controverted. Et per Holt, C. J. To make the landlord a defendant in ejectment is of right; for otherwise he might lose his possession, by combination between the plaintist and tenant in possession; and the court inclined to grant the motion, because there could be no inconvenience, and it would make the verdict more considerable; but in regard the wise lived in Cheshire, and must have fourteen days notice of trial, and the desendant would not waive that, the court perceived it a trick to put off the trial; so nothing was done. I Salk. 157.

The court will not endure a lessee to defend (alone) an ejectment against his landlord, or those claiming under him,

on a supposed defect of title. 2 Blacks. Rep. 1259.

When the rule for judgment against the casual ejector is out, the plaintist's attorney must search at the chambers of the respective judges in B. R. for the desendant's plea, (in case he has appeared) and consent rule. To which, after the judge, with whom it was lest, has signed it, and the plaintist's attorney given a receipt for the same, he signs his name over the desendant's attorney, and then carries it to the clerk of rules, who siles it, and draws up the consent rule from it on stamp, for which he is paid 6s. of which rule the plaintist's attorney makes a copy, and annexes the same to

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the iffue, when delivered to the defendant's attorney for trial. But in C. B. when the defendant has appeared, and left the confent rule in the Prothonotary's office, the plain. tiff's attorney reforts there for it, and having figned his name over that of the defendant's attorney, he gets two rules from it, drawn up by the Secondary on Stamps, one for each party, for which he pays 7 s. and then the plaintiff's attorner makes up the iffue, and delivers a copy thereof, with notice of trial on the defendant's attorney, and proceeds to trial as m other cafes o brothand and

Note: If the plaintiff proceeds in ejectment by original, he does not fue out his original writ at first, but proceeds by dehivering his declaration as by bill; but if a writ of error thould be brought, he must sue out his original writ, which must be returned by the Sheriff, and filed in the treasury; or if the tenant has not appeared, the original must be fued, returned, and filed properly; and if he has appeared, then, on fuing out the original, you must insert his name, instead of the nominal defendant.

The appearance, when by original in B. R. is entered with the filazer, in like manner as it is in other fuits by original; and the writs are made out returnable on a general return day, as in other cafes hall than the cafes in other cafes

The pracipe for the curfitor, to make out the original wit by, is as follows:

contribute leade, entry and outter. Middlefer, to wit. If John Den Shall make you fecure, Go then put, &c. Richard Fen, late of, &c, that he be before our lord the king, on where over, &c. to shew wherefore, with force and arms, he entered into four melfuages, &c. [reciting the premises] with the appurtenances, in the parish of St. Mary, Ishington, in the county of Middlefex, which William Smith demised to him for a term, which is not yet expired, and ejected, &c. and other enormities, &c. against the peace, &c. and to the damage, &c.

the reat in arrent had been lerg. 1801178 in the

many made; and in case the lettee or lettees, his, queto or

Ancient demesne has always been held a good plea in ejectment. But application to plead it must be made within the four days. Vide Barnes, 194. 187. It ought to be pleaded in the first four days. Idem. 331-

This flatuite relates only to Fred with for non-payment of

their affiguee or affiguees, or other person or

where the andford has a right to re-enter-

of proceeding to recover Premisses according to the 4 Geo. 2. c. 28. by a Landlord having a Right of RE-ENTRY.

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BY the 4 Geo. 2. 6.28. J. 2. after reciting that inconyeniences, often happen to landlords or lessors in cases of re-entry for non-payment of rent, by reason of the many necties that attend the re-entries at common law, &c.

It is enacted, "That in all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, bath right by law to re-enter for the non-payment thereof; such landlord or lessor shall and may, without any formal demand or re-entry, ferve a declaration in ejectment for the recovery of the demised premifies; or in case the same cannot be legally served. or no tenant be in actual possession of the premisses, then to affix the same upon the door of any demised messuage; or in case such ejectment shall not be for the recovery of any melluage, then upon some notorious place of the lands, tenements, or hereditaments, comprized in fuch declaration in ejectment; and fuch affixing shall be deemed legal service thereof; which service, or affixing such declaration in ejectment, shall stand in the place and stead of a demand and re-entry; and, in cale of judgment against the casual ejector, or nonsuit, for not confessing lease, entry and ouster, it shall be made appear to the court, where the faid fuit is depending, by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the faid declaration was served; and that no sufficient distress was to be found on the demifed premifies countervailing the arreats then due; and that the leffor, or leffors, in electment, had power to re-enter: then, and in every fach cafe, the leffor, or leffors in ejediment, shall recover fudgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a reentry made; and in case the lessee or lessees, his, her, or their assignee or assignees, or other person or persons claiming or deriving under the faid leafes, shall permit and fuffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without

<sup>\*</sup> This statute relates only to Ejectments for non-payment of the where the landlord has a right to re-enter.

Vol. II. "paying

Of proceeding to recover Premisses according to the 4 Geo. 2. c. 28. by a Landlord hav. ing a Right of RE-ENTRY.

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so paying the rent and arrears, together with fell coffs, s and without filing any bill or bills for relief in equity, within fix calendar months after such execution exe. " cuted; then, and in such case, such lessee, or lessees, & " and all others claiming and deriving under the faid leafe " shall be barred or foreclosed from all relief or remedy in " law or equity, other than by writ of error for reversit of fuch judgment, in case the same shall be erroneous; and the faid landlord, or leffor, shall, from thencefort, " hold the faid demised premisses discharged from such " leafe: and if on such ejectment verdict shall pass for the " defendant, or the plaintiff shall be nonsuited therein, except for the defendant's not confessing, &c. then, in every fuch case, such defendant shall have and recover his, her, or their full costs: Provided always, That no-"thing herein contained shall extend to bar the right of any mortgagee, or mortgagees, of fuch leafe, or any " part thereof, who shall not be in possession, so as such " mortgagee, or mortgagees, shall and do, within fix ca-" lendar months after such judgment obtained, and ex-" ecution executed, pay all rent in arrear, and all costs and "damages fuftained by fuch leflor, person or persons, en-" titled to the remainder or reversion as aforesaid, and per-" form all the covenants and agreements, which, on the are part and behalf of the first lessee or lessees, are and ought " to be performed."

By feet, 3. "A leffee, filing a bill in equity, shall not have an injunction, unless within forty days after the answer of the leffor, he bring into court so much as the leffor shall in his faid answer swear to be due, over and above allowances and costs, there to remain till hearing, or to be paid to the leffor, subject to the decree of the court: and in calc such bill shall be filed within the time, and after execution executed, the leffor of the plaintiff shall be accountable only for so much, and no more, as he shall really make bona saw of the demised premisses from the time of his entering into possession; and if what shall be so made shall appear to be less than the rent reserved on the lease, then the lesses, shall, before he be restored to his possession, pay to the lessor the deficiency."

Sea. 4. Provided, "That if the tenant, & a. shall, at any time before the trial in such ejectment, pay, or tender

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of proceeding to recover Premisses according to the 4 Geo. 2. c. 28. by a Landlord having a Right of RE-ENTRY.

to the leffor, &c. or pay into court all the rent and arrears, together with costs, then further proceedings on the ejectment shall cease; and if the lessee, &c. shall, upon the filed as aforefaid, be relieved in equity, fuch leffee, &c. hall hold the demised premisses according to the lease dereof, without any new lease to be made thereof."

Note, The courts had permitted the tenant to bring into

our the arrears of rent and cost, antecedent to this act.

Salk. 597. Since this statute in ejectment, by a landlord against is tenant, on a proviso for re-entry for a forseiture, the court of B. R. held, that the lessor bringing covenant for alf a year's rent, subsequent to the time of the demise laid in the declaration in ejectment, was a waiver of the right dentry for the forfeiture, and an acknowledgment that the twenant then subsisted. The law will always lean against offeitures, as court of equity relieve against them. Doe exlm. Crompton v. Minshall. B. R. East. 33 Geo. 2.

Tender of rent, before an ejectment delivered, shall stay he proceedings under this act. 2 Blacks. Rep. 746.

After judgment against the cafual ejector, and before any mit of possession executed, the court made a rule to stay he proceedings, on payment of all rent due and costs, it of being pretended, that the ejectment was brought on my other title than a re-entry for non-payment of rent.

Per lord Mansfield, in the case of Dac ex dem. Hitchings Lewis, Burr. 4 pt. 614. The true end of this act of parament is to take off from the landlord the inconvenience his continuing alway liable to an uncertainty of pollelon, from its remaining in the power of the tenant to offer im a compensation at any time, in order to found an apleation for relief in equity] and to limit and confine the mant to fix calendar months after execution executed, for is doing this; or elfe, that the landlord should from thenceorth hold the demised premisses discharged from the

In moving for judgment upon a declaration in ejectment divered, or in case of no tenant, affixed on the premises, coording to this act of 4 Geo. 2. c. 28. the courts require haffidavit, that there was half a year's rent in arrear before claration ferved, that the leftor of the plaintiff had a right

Of proceeding to recover Premisses according to the 4 Geo. 2. c. 28. by a Landlord hav. ing a Right of RE-ENTRY.

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the premisses countervailing the arrears of rent then due, that the premisses were untenanted, or that the tenants could not be legally served with the declaration, (as the case is and that a copy of the declaration was affixed on the most notorious, and what part of the premisses, or the court will not give a rule for judgment.

The affidavit must be to the following effect;

In the George Hunt on the demise of A. B. plaining

Between Richard Roe defendant in ejectment.

A. B. the leffor of the plaintiff in this cause, and John Dixon of, &c. severally make oath; and first, this depo nent John Dixon, for himself, saith, that he this deponent and did, on the day of instant, serve a true copy of the declaration in ejectment hercunto annexed and the English notice thereunto written, by affixing the fame copy on the firest door, or outward door, of the mellion, in question, mentioned in the faid declaration, and late in the possession of Philip Howe: and this deponent, A.B. faith, that half a year's rent then was and now is due and in arrear to him this deponent, from the faid Phili Howe, before the faid declaration was ferved : and the deponent further faith, that he this deponent then was and now is, landlord of the faid meifuage; and that the faid Philip Howe then was, and now is, tenant to the deponent, and holds the faid meffuage by leafe from the deponent; and this deponent also saith, that it appears by the faid leafe, that he the faid deponent then had, and no hath, power to re-enter on the faid melluage for the non payment of the faid half year's rent; and this deponent further faith, that before the faid ejectment was ferved no fufficient diffress was to be found on the said meffuge countervailing the arrears of rent then due to this deponent Sworn, &c.

This effidavit is only necessary upon moving for judgment against the casual ejector, or after a nonsuit at the man for the tenants not confessing lease, entry and ouster.

But if the tenant appears, and the ejectment comes to trial, all the matters in the above affidavit must be prove

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Of proceeding to recover Premisses according 18to the 4 Geo. 2. c. 28. by a Landlord having a Right of RE-ENTRY.

upon the trial. Per Dennison just, in the case of Doe ex dem.

Hitchings v. Lewis, Burr. 4 pt. 614.

The late tenant, or other person, claiming title to the premisses, has the fame time to appear in as is allowed to

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s to prove Pho In ejectment by a landlord, the tenant moved to stay proceedings upon payment of rent, arrear, and costs, according to fest 4. of the above act. And, on a rule to shew cause, it was infifted for the plaintiff, that the case was not within the act, but that it was brought likewise on a clause of re-entry in the lease for not repairing; and the lease was produced in court. However, the rule was made abfolute, with liberty for the plaintiff to proceed upon any other title.

Piere ex demife. Withers v. Sturdy. H. 1752.

Lessors of plaintiff were both devisees and executors, and in each capacity rent was due to them. Defendant moved to stay proceedings on payment of the rent due to lessors of plaintiff as devisees, they not being entitled to bring an ejectment as executors. There appeared to be a mutual debt due to defendant by simple contract, and defendant offered to go into the whole account, taking in both demands as devisees and executors, having just allowances; which lessors of plaintiff refused. The rule was made abclute to stay proceedings, on payment of the rent due to leffors, as devisees, and costs. Duckworth ex dem. of Tubley and others v. Tunstall. Barnes, 184.

By this statute 4 Geo. 2. where a landlord has a right of re-entry, and there is half a year's rent due and unpaid, and no sufficient distress on the premisses, or the same are untenanted, there is no occasion for the landlord to make an actual entry, and feal a lease on the premisses in the presence Jame person, as must be done in all other cases where ing to recover which, by a person claiming title, is as

Since this ftat. of Geo. 2. in fuch ejectment by leffor v. leffee, on a condition of re-entry for non-payment of rent, proof of actual entry and oufter is not necessary; nor need the demand of the money for the rent be proved, as formerly was required; as appears by 1 Salk. 259. 2 Ld. Of what, all the matters & One above affiliavit man be pro

Of proceeding in Ejectmention a VACANT Possession, or where the Premisses are UN. TENANTED.

IN all cases, where there is no tenant on the premiss, and the same are vacant, [except in the case of landlord and tenant, where the landlord has a right of re-entry, on half a year's rent being due and unpaid, and he proceeds according to the 4 Geo. 2. c. 28. ante] the proceedings are in the old way by sealing a lease on the premisses; and then, on the motion for judgment, there must be an affidavit of the sealing of the lease, and the purport of it to be shortly set forth in the affidavit; and also in what manner the defendant got the possession given to and taken from the lesses, (who is always made plaintiss) and how the declaration was delivered to the defendant, that the court may judge of the regularity of the proceedings.

The method of proceeding is thus:

A. (the person claiming title) signs the following letter of attorney, to empower B. to execute a lease in his name of the premisses in question to G. which is done upon the premisses, B. and G. being only thereon; then B. after having executed the lease to G. leaves him in possession of the premisses, who is turned out by D. to whom, while on the premisses, E. delivers a declaration in ejectment; and then, on affidavit of the due execution of the letter of attorney, and executing the lease in the above form, you move for judgment.

are on this condition nevertheless, that if the faid will have allers to the following effect: The letter of attorney is to the following effect:

"KNOW all men by these presents, that I A. B. &c. have made, ordained, constituted, and in my stead and place, and by these do make, ordain, constitute, and in my stead and place put C. D. of, &c. my true and lawful attorney, for me, and in my name to enter into and take possession of all, &c. in the tenure of, &c. and, when he hath taken possession thereof, and for me, in my name, and as my deed, to seal and execute a lease of the said premisses unto E. F. of, &c. to hold the same to him, his executors, administrators, and assigns, from the date hereof, for the term of the years, at the yearly rent of a pepper-corn, (if lawfully demanded) subject to a proviso, to be void on my tendering of 6 d. to the said E. F."

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Of proceeding in Ejectment on a VACANT Possession, or where the Premises are un-

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H. H. maketh oath, that he was present and did see A. B. of, &c. duly sign, seal, and deliver the letter of attorney because annexed.

Cottag a Gro. 2. c. 28. out of the proceedings are in the

The leafe referred to by the above letter of attorney.

THIS INDENTURE made, &c. between A. B. of, &c. of the one part, and E. F. of, &c. of the other part, witnesseth, that the said A. B. for and in consideration of the sum of five shillings of lawful, &c. to him in hand paid by the faid E. F. at and before the fealing and delivery of these presents, the receipt whereof the said A. B. doth hereby acknowledge, hath granted, demised, fet, and to farm let unto the faid E. F. his executors and administrators, all, &c. now or late in the tenure of, &c. to have and to hold the faid herein before mentioned and hereby demised premisses, with all and every their appurtenances, unto the faid E. F. his executors, administrators, and affigns, from the day of last past, before the date of these presents, unto the full end and term of five years from thence next enfuing, and fully to be compleat and ended, yielding and paying therefore, during the faid term, unto the faid A. B. or his affigns, the rent of one pepper-corn, at the feast of yearly, (if lawfully demanded) provided always, and these presents are on this condition nevertheless, that if the said A. B. or his affigns, shall, at any time or times hereafter, tender, or cause to be tendered, unto the said E. F. the sum of 6d. that then and in fuch case, and from thenceforth, this indenture, and every thing herein contained shall cease, determine, and be absolutely void; any thing herein contained to the contrary thereof in any wife notwithstand.

The attorney is to write the name on the first name, and as my name, and as my name, and as my name, to feel and principal.

Scaled and delivered as the act and deed of the above named A. B. by C. D. of, &c. by virtue of a letter of attorney to him for that purpose made by the said A. B. bearing date the day of this instant, being first duly stamped in the presence of

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Of proceeding in Ejectment on a VACANT Possession or where the Premisses are un. TENANTED. TENANTED.

The form of the affidavit required of the proceedings in case of a vacant possession, is as follows: vacantage and

and in fuch case there must be an afridavit of H. H. of, &c. maketh oath, and faith, that he this depo. nent, on, &c. now last past, did see C. D. of, &c. for and in the name of A. B. the leffor of the premisses in this cause, severally enter upon and take possession of part of the premises in the deed hereunto annexed mentioned by entering into the first of the faid houses, and putting his foot on the threshold of the outer doors of two other of the faid houses, the same being locked and uninhabited, fo that no other entry thereon, or possession thereof, could be made or taken without force. And this deponent did then likewise see the said C. D. after such his entry into and upon the faid premisses, and whilst he was in such polfession thereof as aforesaid, at each of the said houses, sal and deliver the leafe hereunto annexed unto the plaintiff; and further faith, that after the faid leafe was fo executed, this deponent did see the plaintiff take possession of the said short three houses with their appurtenances, by virtue of the faid leafe, by entering upon the threshold of the faid outer doors of the faid three houses, the same being then locked steel and uninhabited, and no other entry to be made therein, fave as aforefaid , and this deponent faith, that immediately afterwards, the defendant did enter each and every of the faid three houses, and turned the plaintiff out of possession thereof, by thrusting him out of the same; whereupon this deponent did then and there deliver and leave with the faid defendant, a true copy of the declaration hereunto antitle hath been let in to defend; but he that can baxoneal a

HoHpon the premifies, must obtain polletion, and any other person claiming, title may eject him if he can survey the

course of the court, no desence can be made in these cases of course not on as beyond ad flum noiters and all of the cases fore the effoign day of the term, in order to entitle the plaintiff to judgment as of that term; and there needs no notice at all at the end of the declaration; for instead of notice, the plaintiff only gives one rule to plead as in common actions; and on no plea being put in within the regular time, by the rule the plaintiff is entitled to judgment.

In Ejectment for an empty house, a lease was sealed upon the land, and a declaration delivered to the cafual ejector, and judgment

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Of proceeding in Ejectment on a VACANT AU Possession, or where the Premisses are un-TENANTED.

judgment and execution had; yet because they had not moved for a peremptory rule to plead the judgment was fet afide. and in such case there must be an affidavit of the sealing of the leafe, entry, &c. 151 Salk. 255.

In cases of vacant possession, no person claiming title will be let in by the courts to defend; but he that can first seal a lease on the premisses must obtain possession. Bull. Ni.

Pring6. I Barnes, 122. And therefore, the person claiming title must refort to his new ejectment.

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An ejectment on a vacant possession in London or Middlefex, on the 4th of Geo. 2. may be moved at any time in term, and is not within the old rule concerning motions in ejectment, Trin. 32 Car. 2. which relate only to declarations in ejectment served upon tenants in possession. Barnes, 172.

Motion for judgment in London, on a vacant possession, where the notice to appear was not on the first day, but in the beginning of Michaelmas term; the court made a rule for judgment, unless some person claiming title appeared

within four days. Barnes, 175.

Motion that B. and B. who claimed title to some lands and tenements in Middlesex (the possession whereof was vaeant) might be informed by the attorney for the person, who was carrying on the proceeding in the old way, under a leafe fealed on the premisses, of the names of the parties in ejectment, in order that B. and B. might appear and defend the title. It was urged for the attorney, that in all cases of a vacant possession, unless such as are within the 4 Geo. 2. concerning landlords and tenants by leafe, with a claufe of reentry, no instance can be shewn, where any person claiming title hath been let in to defend; but he that can first feal a leafe upon the premisses, must obtain possession, and any other person claiming title may eject him if he can; and by the course of the court, no defence can be made in these cases but by the defendant in the ejectment, who is a real ejector. No rule: Burnes, 177. Ex parte Beauchamp and Burt. at all at the end of the declaration; for inflead of notice, the

and on no plea being fut in within the regular time, by the rule the plaintift is thrifted to judgment.

plaintiff only gives one fuld to plead as in common actions;

# Of proceeding to recover Premisses by a MORTGAGER

IF a mortgagee of the premisses, having a right of entry, wants to get possession of the premisses, and the same are untenanted, the mortgagee should seal a lease, in order to nominate the plaintiss in ejectment; who is to be turned out by the nominal defendant, and then the ejectment must be delivered to the nominal defendant, to which declaration

there is no need of notice as in other cases.

Such mortgagee, or lessor of plaintiff, should enter upon and take possession of the premisses in question, by going upon the land; or, if a house, by putting his foot upon the threshold of the house uninhabited; and then after such entry, and whilst he so remains on the premisses, seal and deliver a lease to the nominal plaintiff, and give him possession; and after such lease is excuted, and nominal plaintiff taken possession, then the nominal defendant must come and put the plaintiff by, and take possession of the said premisses; to whom, while he so remains in possession, another

person must deliver the declaration in ejectment.

The above lease differs not from a lease for a term, [which vide ante] only at the end is inserted the following clause: "Provided always, and it is the true intent and meaning of these presents, that if I the said lessor of the said E. F. my executors, administrators, or assigns, shall at any time hereafter tender to the said plaintiss, his executors, administrators, or assigns, the sum of one shilling; then these presents, and every thing herein contained, shall be void and of no effect. In witness whereos, I the said A. B. the lessor of the plaintiss, have set my hand and seal the day and year first above written. Signed, sealed, and delivered by the said A. B. (lessor or mortgagee) to the said E. F. the tenant or lessee, close to the threshold of the door of the said messuage, in the presence of us,"

O. P. Q. R.

Instead of the notice at the foot of the declaration, there must be a rule to plead given in this case, and the parties must be all real persons.

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When the rule to plead is out, judgment may be figned, and the plaintiff has no occasion to move for judgment, as

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# Of proceeding to recover Premisses by a MORTGAGER.

If a mortgagee means only to get into the receipt of the rents and profits of the estate, he need not give notice to a tenant to quit, before bringing his ejectment, though the mortgage be made subsequent to the tenant's lease. But in such case, he shall not be suffered to turn the tenant out of possession by the execution. White ex dem. Whatley v. Hawkins. Mich. 14 Geo. 3. Bull. Ni. Pri. 96. And though, in this case, the lease was only from year to year, and, with respect to the last year, might be considered as a lease subsequent to the mortgage, yet the court held it would have been the same, if the lease were for a long term.

If a man makes a mortgage for years to A. who, without the mortgager's joining, affigns to B. who affigns to C.—C. may bring ejectment against the mortgager; for, upon executing the deed of mortgage, the mortgager, by the covenant to enjoy till default of payment, is tenant at will, and the affignment of the mortgagee could only make him

tenant at Sufferance. I Salk. 245.

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But it has been said, that it would be otherwise, if the mortgager were to die, and his heir enter, and then the mortgager make an affignment without entry, or the heir of the mortgager joining; for the entry of such heir would be tortious, and consequently, the mortgager would be out of posession, and his affignment void. Ibid. Tamen quære.

In ejectment of tenants of the mortgager, he defended, and plaintiff only proved the mortgage, and fuch proof was held not to be fufficient; for he should have proved the lands in possession of the persons to whom the ejectments were delivered, as the defendant only admits himself landlord to them

of lands in their poffession.

By the 7 Geo. 2. c. 20. An act for the more easy redemption and foreclosure of mortgages, after reciting, that mortgages frequently bring actions of ejectment for the recovery of lands and estates to them mortgaged, and bring actions on bonds given by mortgagers to pay the money secured by such mortgages, and for performing the coverants therein contained; and likewise commence suits in equity, to foreclose their mortgagers from tedeeming their estates; and the courts of law, where such ejectments are brought, have not power to compel such mortgages to actept the principal monies and interests due on such mortgages and costs, or to stay such mortgages from proceed-

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# Of proceeding to recover Premisses by a Montgager.

ing to judgment and execution in such actions, but such mortgagers must have recourse to equity for that purpose; " in which case likewise, the courts of Equity do not give re. lief until the hearing of the cause." For remedy, &c. it is enacted, "That where any action shall be brought on any bond, for payment of money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of the courts at Westminster, great sessions, or superior courts of the coun. ties palatine, by any mortgagee, &c. his heirs, executors, administrators, or affigns, for the recovery of the possession of any mortgaged lands, &c. and no fuit shall be then de pending in any of his majesty's courts of Equity, for or touching the foreclosing or redeeming of such mortgaged premisses; if the person, having right to redeem such mongaged premiffes, and who shall appear and become defendant in fuch action, shall at any time, pending such action, pay unto fuch mortgagee, &c. or, in cafe of his refusal, shall bring into court, where fuch action shall be depending, all the principal monies and interest due on such mortgage, and also all such costs as have been expended in any suit at " law or in equity upon fuch mortgage, [fuch money for principal, interest, and costs, to be ascertained and computed by the proper officer of the court] the monies fo paid, or brought into court, shall be deemed and taken to be in full farisfaction and discharge of such mortgage; and the court shall and may discharge such mortgager of and from the fame accordingly; and shall and may, by rule of " the same court, compel such mortgagee, at the costs and charges of fuch mortgager, to affign, furrender, or reconvey fuch mortgaged premisses, and fuch an interest therein as the mortgagee hath, and deliver up all deeds, &c. in his cuttody, relating to the title thereof, to the mortgager, who thall have paid or brought fuch monies into court, or his executors, &c. or other person as he shall appoint."

The second section enacts, "That on bills of foreclosure

brought in equity for the payment of the money, or in default thereof for the recovery of the premisses, such court of equity, upon application of the defendant having a right to redeem, and upon admission of the plaintiff's right, may,

before hearing, make order therein, as if the cause had been brought to a hearing, &c." under deal to mittain and

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#### Of proceeding to recover Premises by a MORTGAGEE.

Provided, "that this act shall not extend to cases where the right of redemption is controverted or the money due not " adjusted, nor to prejudice any subsequent mortgage."

A judge made an order, pursuant to this act, to flay the mortgagee's proceeding in ejectment, upon bringing principal, interest, and costs, into court; and a rule was made to make the order a rule of court nifi caufa. But it afterwards appearing to the court, that notice had been given by the mortgagee to the mortgager, that he infifted upon payment of two bonds, which were a lien upon the estate, the case was adjudged to be out of this act, and the rule nifi was dif-

charged. Barnes, 177.

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Motion to fray proceedings in ejectment, on payment of mortgage-money and costs, pursuant to this act; on shewing cause the plaintiff produced an affidavit, that the mortgagee had been at great expence in necessary repairs of part of the premisses in his possession, (the ejectment was brought for the relidue) and therefore prayed, that the prothonotary might be directed to make allowance for such repairs. Per cur. The rule must follow the words of the statute. The prothonotary will make just allowances and deductions. Barnes,

Rule on flat. 7 Geo. 2. to shew cause why proceedings should not be stayed, on payment of mortgage-money and costs was made absolute; the lessor of plaintiff, assignees of the mortgagee infifted to be paid a bond, and a simple contract debt due to themselves in their own right. Per cur. A bond is no lien in equity, unless where the heir

comes to redeem. Barnes, 182.

nos. In Mich. term, 20 Geo. 3. B. R. a case reserved from the Onford circuit came on respecting a mortgagee's getting into the receipt of the rents and profits of the estate. Case was as follows: The plaintiff obtained a leafe of the premisses from H. I fanuary, 1772, for twenty years, rendering 40 le rent, payable the 12th of May. In May 1772, H. mortgaged to the defendant G. The lesse entered at the commencement of his term, and had paid all the rent to H. except 28 1. Afterwards, in Nov. 1778, H. became a bankrupt, the faid 28% being due to him for rent from the plaintiff; and more than that due from the bankrupt to the defendant G. for interest on the mortgage. 31 December, notice was given to the plaintiff of the bankruptcy of H. and a demand of the tent due was made by the affignees; and on 13th January following,

#### Of proceeding to recover Premisses by a ying Processing Dandating Declara-

lowing, notice was also given to the plaintiff of the mort. gage, and a demand made of the faid rent in arrear by the fendant G. the mortgagee; which not being paid, P. the other defendant, by the direction of G. distrained for the faid rent, and gave notice. On which the plaintiff brought trespass; and the court held, that the mortgagee had the legal interest in the premisses; and that, after notice had been given by him, he might diffrain for the rent due, and not paid to the mortgager before notice, to fatisfy the arrears of interest due to him on the mortgage. Moss v. Gallimore and Laickenham and Jurganth, Pyott. gas on but smidt

Where there are two or more mortgages, the court will not stay proceedings, and compel a redemption of one mortgage only, upon payment of the principal, interest, and costs on that mortgage, without paying the rest. " Roe ex dem. of Kaye v. Soley, affignee. Mich. 11 Geo. 3. C. B. 2 Blackf. Rep. 726 belief on a bill some short and a series of the

not to be emendable after verdich, be cause it would be another titled a second of the second of the second of the second

The termin closting it being acce explains it was amonded. without any confent, from five years to ten years. Watery, Shotherd, Strave 272. But will sell 259. At the term Expires. genoing the fint, it cannot be entarged without confents soil

But where a coule was hing up to long by agreeneds. on feetial verdick, that the term expired, the court would not let it be enlarged. Anone as at the contract the

On perial verdict in ejectment, the matter of law and been argued, and the court having ricen time to confider, paintiff moved to enlarge the somme, which was near expring; but defendant not conferring, the court declared? they had no power to enlarge the denile without conlent. Barnes, 8. Comments of the second of the sec

Declaration in ejectment amended by making the verbsin the plural number, they entered, inflead of he entered Eco Stra. 807. Mark Co. Trans. I was to the second of the seco

On a ride to thew caule, why a declaration in ejectment. fiduld not be amended on payment of coffs, by altering the ome of the demile, where the plaintiff had been bured by a the from bringing a new ejectment, the rule was made ob-

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Of amending the Declaration in Ejectment, staying Proceedings, consolidating Declarations, &c.

IT is a rule in both courts, that no declaration in ejectment, can be amended before appearance; and after appearance, amended only in form, but not in the demise, or

other matter of fubstance. Vide Barnes, 186.

In the declaration delivered to the tenant in possession, the said James, instead of John, was said to enter by virtue of the demise; and the court refused to amend it, for they considered it as process: and Mr. justice Wright cited a case, Hil. 15 Geo. 2. where the premises were laid to lie in Twickenham and Isleworth, or one of them; and the court refused to let the plaintist amend by striking out the disjunctive words. Stra. 1211.

But if the declarations delivered be right, it feems, that they will be a fufficient warrant to amend the declaration

on record by. Vide 2 Ld. Ryam. 896.

The demife was laid in 1697, instead of 1696;—1697 not being come at the time of the trial. And it was holden not to be amendable after verdict, because it would be another title.

The term in ejectment being near expiring it was amended, without any confent, from five years to ten years. Oats v. Shepherd, Stra. 1272. But vide Salk. 257. if the term expires, pending the suit, it cannot be enlarged without consent.

But where a cause was hung up so long by agreement, on special verdict, that the term expired, the court would

not let it be enlarged. Anon.

On special verdict in ejectment, the matter of law had been argued, and the court having taken time to consider, plaintiff moved to enlarge the demise, which was near expiring; but defendant not consenting, the court declared they had no power to enlarge the demise without consent. Barnes, 8.

Declaration in ejectment amended by making the verbs in the plural number, they entered, instead of he entered, &c.

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On a rule to shew cause, why a declaration in ejectment should not be amended on payment of costs, by altering the time of the demise, where the plaintiff had been barred by a sine from bringing a new ejectment, the rule was made absolute. Burr. Rep. 4 pt. 2446.

The

Of amending the Declaration in Ejectment, of taying Proceedings, confolidating Declarations, &c.

The term in ejectment was enlarged, being expired twelve years before the action brought, on payment of costs; the cause being at issue, a special jury struck, and the parties gone down to trial, before the mistake was discovered Rose ex dem. Lee v. Ellis. C. P. East. 14 Gro. 3: 2 Blacks.

Rep. 940.

Ten declarations on the same demise were delivered for ten houses in Steyning in Sussex; in the occupation of tempersons; and on motion to consolidate them, and put them all in one issue, upon suggestion that the title was the same in all, the court resused it; for they said the lessor might have sued them at ten different times, and it would be obliging him to go on against all, when perhaps he might be ready in some of them only. Stra. 1149.

But in C. B. on motion to consolidate fixteen ejectments in one, after fixteen several issues joined, and though it was urged for the plaintiff, that the issues were delivered and paid for a long time ago, the court held, that it was necessary for the desendants to pay for the issues to prevent judgment, and ordered the ejectments to be consolidated.

M. B. Each declaration contained a large number of melluages, and they were word for word the same. Had each been for one melluage only, the plaintiff might have

tried them separately. Barnes, 176.

Proceedings were stayed till the lessor of the plaintist should give security for the costs, [his residence being in Ireland;] although this ejectment was brought under the direction of the court of Chancery, and 401. security had been already given there. Burr. 4 pt. 1177.

If the leftor of the plaintiff is an infant, the court on motion will oblige him to name a good plaintiff who will be answerable for costs. Stra. 694. 932. Barnes, 183.

Upon affidavit of the death of teffor of plaintiff, a rule was made to shew cause, why proceedings should not be stayed, till some person gives security for desendant's costs, if any shall be adjudged to him. The court thought security ought to be given; but plaintiff's attorney undertaking for the payment of such costs, the rule was discharged. Barner,

If a second ejectment is brought, the costs of the first not being paid, the court on motion will stay proceedings therein

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Of amending the Declaration in Ejectment! flaving Proceedings, confolidating Declarations, &c.

il those costs are paid. Lord Conyngsby's case. Stra. 548. hid 11152.00 So proceedings stayed in error, and a second ferror was brought with any other view than to keep off he payment of cotts. Stra. 554.

All the courts confider a former ejectment in another ourt, as they do a former ejectment in the fame court, and flay proceedings in a new one, till the costs of the for-

nemare paid be Barnes, pagilonos or notion no bas

In C. B. proceedings in a fecond ejectment were stayed heday before trial, till the costs of a former ejectment in B.R. were paid. 2 Blackf. Rep. 1158.

So proceedings in a fecond ejectment shall stay, till the ofts of a former are paid; though in such former ejectment, he lessor of plaintist never entered into the consent rule. in one, after fixteen feveral iffues joined, an. 400 iqual ilasla

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A former ejectment had been brought on the demise of he same deffors, wherein defendants had a verdict, and obained an attachment against R.M. one of the leffors, for on-myment of costs ; whereupon he was arrested, and cained in custody: and a new ejectment being brought, fendant moved to fray the proceedings till the costs of the mer were paid. But per our. the leffor of plaintiff be g in custody upon the attachment for costs, which is in auren of a ca. fa. there is no reason to grant the rule. thould give fecurity for the coffs, [his refidence loss given

But where the plaintiff in ejectment having declared on dedenife; to which not guilty was pleaded; but afterards finding it necessary to add another demise of trustees, delivered a new ejectment on the double demise; and on otion to flay proceedings on the last, till payment of costs, of for notice where the leffors were to be found, groundg the motion, as to the first part, on Lord Conyngsby's e and as to the latter, on the common case of a qui tam; cause here the leffor was to enter into a rule — The court anted the last part ; but as to the costs, they faid, it was ver done but where it appeared the party was vexatious, had run the defendant to a great expence; as was Lord myng/by's case, who came for a trial at bar on his new ectment, after the former cause was ready for the bar, hich was a matter of mere favour, in which they might ake their own terms. Short v. King. Stra. 681. VOL. II. The

Of amending the Declaration in Ejectment staying Proceedings, consolidating Declarations, &c.

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The leffors of plaintiff delivered three ejectments in C. B. and two in B. R. for the same tenements, and made the defendants attend at five affizes, but countermanded in tim to fave costs; and on application to stay proceedings in the last ejectment, till costs paid of the former, on account the vexation,—The court would not do it, inasmuch cofts were not demandable by the rules of the court. Str The vile prins records in

The court will not give plaintiff leave to discontinu after a special verdict has been had, in order to adduce find proof in contradiction to the verdict. Roe ex dem. of Gra v. Gray. C. B. Eaft. 12 Geo. 3. 2 Blacks. Rep. 815.

ta pus darrein continuance, in bar to the plaintiff's action ; at it is at the diferetion of the jultices, whether they will give it; but it they do, it flops the trial, and the plamis not to reply to it'at the affices; but the judge is to eurn it as parcel of the record of nift prins. Igla 180. 6. Cor 261.

The plaintlifthas a right to process, both for the polfor and the verbals, and therefore the death of the folfillough only tenant for ire is no abatement; but if plaintiff, in firth case, infill to go on, the court will ge him to give fecurity for payment of the coffs, an cafe

egueint go ago oft him. Street tocke. It will be There can be no alteration in the dectaration to the idi in the first declaration dilivered, only in the descedant's

me. And on motion, B. R. made a role, that the iffine . wid he made according to the declaration delivered against t cajual ejector, it having been altered as to the demide, .

# Raym. 14.1. After defendants had appeared, pleaded, and entered murecommon rule by canfent, their attorney neglected to-pass

the issue-book, whereupon judgment was nigned against restrai ejector, which, or motion was let abde as ngular, Plaintift might have figaed redement against des

Mante, who had appeared, the non-payment of the illust, ok, out not agrind called action. Barney 284 and hard

#### of making up the NIST PRIUS Record in ent gaving Proceedingmosignlidating Declara

F the tenant, or landlord appears, the plaintiff having got the plea and rule, must draw up the issue, entitling of the same term as the plea is of; then copy the consent the and annex the same to the issue; indorse thereon the mey, charging 4d. per sheet; and also for entering the the issue, or the plaintiff may fign judgment.

The nisi prius records in ejectment are made up in the me maner as nife prive records in other actions, for which the first volume, observing the distinction between pro-

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If the plaintiff, after iffue, and before the trial, enter to part, the defendant may, at the affizes, plead this as a ea puis darrein continuance, in bar to the plaintiff's action; it it is at the discretion of the justices, whether they will ceive it; but if they do, it stops the trial, and the plainf is not to reply to it at the affizes; but the judge is to turn it as parcel of the record of nisi prius. Yelv. 180. ro. Car. 261.

The plaintiff has a right to proceed, both for the poffion and the trespass; and therefore the death of the lef-r[though only tenant for life] is no abatement; but if e plaintiff, in fuch case, insist to go on, the court will lige him to give fecurity for payment of the costs, in case

dgment go against him. Stra. 1056.

There can be no alteration in the declaration in the issue me. And on motion, B. R. made a rule, that the issue ould be made according to the declaration delivered against e cafual ejector, it having been altered as to the demise.

After defendants had appeared, pleaded, and entered into ecommon rule by consent, their attorney neglected to pay the issue ecasual ejector; which, on motion, was set aside as a tegular. Plaintiff might have signed judgment against demands, who had appeared, for non-payment of the issue of

of the Trial in Ejectment, and of Judgment against the CASUAL EJECTOR for not confessing, &c.

If on the trial the defendant will not appear, and confess lease, entry and ouster, the course is to call the defendant to confess, &c. and his attorney, if he be within the rule, and then to call the plaintiff and nonsuit him; and pray to have it indorsed on the postea, that the nonsuit was for my confessing lease, entry and ouster, and then upon the returned the postea, judgment will be given against the casual ejector, because the defendant has not complied with the terms of the rule, upon which the court admitted him to be the defendant. Afterwards, on application to the master or posthonotary, costs will be taxed upon the rule for confessing lease, entry and ouster; and if the same are demanded of the defendant, and he refuses to pay them, the court will, or motion and affidavit of such resusal, grant an attachment against him. Salk. 259.

If there be several defendants, and some of them do mappear and consess, according to the old method, a verde was to be taken for them. And the postea was indorsed, the the verdict was for them because they did not consess; and then the plaintist, upon the return of the postea, had judy ment against the casual ejector for such lands as were in the possession of those who did not consess. Claxmore v. Such

& al. Ld. Raym. 729.

But it is faid in Salk. 456, that by a rule made 4 Ann. i B. R. In such case the plaintiff shall go on against the who will confess, and shall be nonsuited as to those wh will not confess; but the cause of the nonsuit shall be a pressed on the record; and then upon the return of the postea, the court being informed what lands were in the po design of those desendants, judgment shall be entered again the cafual ejector as to them. Mr. Buller in his nift prius lay that he could find no fuch rule in the printed book. An that in the case of Ellis v. Knowles, E. 7 Geo. 2. C. B. Barnes, 118. upon the above precedent of Claxmore of Searle & al. judgment was given, on motion, against the casual ejector, as to such of the defendants as were a quitted at the trial for not confessing, as appeared by indorse ment on the postea, which seems to be the right way. It Bull. Ni. Pri. 98.

A rule was made to shew cause, why a non-pross for no confessing lease, entry and ouster, should not be set aside, the being a material variance between the issue and the record

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for no , then ecord he desendant therefore did not confess. Per cur. Coneffon would not have been a defence; defendant might have flerwards moved to fet aside the verdict for the variance; he non-profs is regular; but let it be fet afide on payment of costs. Barnes, 175.

Upon the trial, one of the defendants confessed lease, entry and ouster, and a verdict was found against him for one third of the tenements in question. The other defendant did not confess, and against him plaintiff moved for costs, which in his case he could not have upon the common rule by conent. The court made a rule to shew cause, which was aferwards made absolute, no cause being shewn. Barnes, 121. Verdict against defendant A. who on the trial appeared, and consessed lease, entry and ouster; the other defendants did not appear and confess; thereupon they, according to the usual matice in such case, were found not guilty.—Plaintiff obnined leave to fue out an habere facias possessionem on the judgment against the casual ejector as to them, and got his costs taxed on the postea; for which costs he thereby could only have remedy against defendant A. He then moved that the Prothonotary should tax his costs against B. (one of defen-

dants who did not appear and confess) on the common rule, by consent entered into for him, whereon a rule was first made to shew cause, and afterwards absolute. Barnes, 149. on against do

and then upon the Yerurn of the hand to hat lands were lathe po hou as mote-net plants, judgment finall be entered again section as to their. Mr. Buller in his wife principal

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Of proceeding against the Plaintiff nonsuited at the Trial, and of the Plaintiff's recover. ing his Costs of a Nonsuit for not confes fing, &c.

IF a verdict is given for the defendant, or the plaintiff nonfuited for any other cause than for the defendant not confessing leafe, entry and oufter, the defendant must pro ceed to tax his costs on the postea as in other actions, and so out a capias ad fatisfaciendum against the plaintiff; and if upon shewing the said writ under seal to the lessor of the plaintiff and ferving him with a copy of the rule by confent to confess lease, entry and ouster, the lessor of the plaintiff does not pay them, the court will grant an attachment again

If the plaintiff is nonfuited, he may pay the costs to which

of the defendants he pleases. Stra. 516.

The plaintiff in ejectment is a meer nominal person, and trustee for the lessor; and therefore he cannot release the action, without being guilty of a contempt; or if an action for mesne profits after recovery be brought in his name, and he releases it, he may be committed for a contempt.

So the cafual ejector is only a nominal person, and has m interest in the premisses, therefore a casual ejector cannot con

fess judgment.

s judgment. Stra. 531.
The nominal plaintiff and casual ejector stand in the sam light; the nominal plaintiff cannot release the action; the a

sual ejector cannot bring error. Barnes, 189.

Defendant at the trial did not appear to confess, &c. a non fuit happened; and afterwards the plaintiff's leffor, instead taking his remedy for the costs taxed upon the common rul as he ought to have done, entered judgment against the ca fual ejector, fued out a fi. fa. against the defendant's good and levied his costs thereon, acting as special bailiff himself An action being brought for this irregular levy in B. R. th defendant moved in C. B. to set aside the fi. fa. and the cour ordered restitution to be made, and the desendant's costs to be paid by the leffor and his attorney; and by confent the action in B. R. to be discontinued without costs, and n other action brought. Barnes, 182.

Defendant, the landlord admitted to defend by specia rule, did not appear at the trial to confess lease, entry an ouster, whereby plaintiff was nonsuited. Plaintiff produce the postea, and moved for leave to take out execution again the casual ejector, upon the judgment signed by virtue

of proceeding against the Plaintiff nonsuited at the Trial, and of the Plaintiff's recovering his Costs of a Nonsuit for not confesfing, &c.

the special rule to defend, which was granted absolutely.

Barnes, 182. Though defendant confess lease, entry and oufter, yet he may deny that he is in possession of the premisses for which the plaintiff goes, and put the plaintiff upon proving it; and if he cannot, he will be nonfuited. Smith v. Mann. Tr. 21

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Determine at the trial did not appeal to contain

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Lefendant, the lander admitted to defend by force

selected not appear at the trial to confets half, entry a my entry a solder, whereby plaintiff was nominited. Plaintiff product could the paylog and moved for feave to take out execution again this siesso, upon the judgment ligned by virtue

Of the Verdict, and Judgment in EJECT,

AS the verdict is the ground of the judgment, it ought not to be entered for more land or different parcels than the defendant was found guilty of by the verdict; but a variance between the verdict and judgment occasioned by the misprission or default of the clerk in entering the judg. ment, is not fatal, but hath been amended by the court af. ter a writ of error brought. - As where the plaintiff had Judgment, " That he recover his term of a messuage and ten acres of land, and the verdict acquitted the defendant quead the land, [by which the judgment was larger than the verdict] and, because it appeared to be the misprision of the clerk, who had not purfued the verdict which ought to have been his guide in making up the judgment, and no mistake in point of law in giving the judgment, therefore the party ought not to fuffer for his misprission, since the statute of 8 H. 6. c. 12. gives the judges, in affirmance of their judgment, power to amend and reform what in their discretion seems to be the misprision of clerks.

If the plaintiff has a verdict for all, the entry of the judgment is, that " the plaintiff recover his term against the defendant of and in the premisses aforesaia;" and till the statute 5 & 6 W. & M. took away the capiatur fine, there used to be also

judgment quod capiatur. Carth. 390.

But if the judgment in ejectment be entered, "that he recover possession of the term aforesaid," this is as well as if it had been, "that he recover his aforesaid term," because both signify the same thing, the possession itself being to be recovered on the habere facias possessionem. Law of Ejest.

And hence it is, that if the term expires pending the suit, the plaintiff cannot recover the possession, because the court cannot give the plaintiff judgment for the land, when it appears upon the face of the record that his title to it is determined: yet he shall have his judgment for damages, because

the trefpass still remained. Sav. 28. Co. Lit. 285.

If a material witness for defendant be also made a defendant, the right way is for him to let judgment go by default; but if he pleads, and by that means admit himself tenant in possession, the court will not afterwards, upon motion, strike out his name. But in such case, if he consent to let a verdict be given against him, for as much as he is proved to be in possession of, I see no reason why he should not be a witness for another defendant. Bull. Ni. Pri. 98.

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# Of the Verdict, and Judgment in Eject-

If the defendant be acquitted of part, and judgment be entered quod def. fit quietus quoad, &c. that part whereof he is acquitted, this is error: because the judgment in this action is not final as in the writs of right, and the judgment in this action does not protect the defendant from any further suit, but only quits against the title set up by the plaintiff in that action. But since it appears that the plaintiff's demand was groundless as to that part whereof the defendant was acquitted, the judgment as to that part must be set down to be quod def. eat inde sine die. The plaintiff as to that having no surther cause to detain him longer in court. Cro. Eliz. 763.

If one of the defendants die after a verdict, the plaintiff shall have judgment against the survivors, on his suggesting the death of one on the roll; but then the judgment must be entered as to the person deceased, quod quer. nil capiat. Moor 469. Cro. Car. 513. 14. Jon. 401. Law Ejest.

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If an ejectment be brought against baron and seme, and the plaintist hath a verdict against both, and before judgment the husband dies, the plaintist may, on the suggestion, have judgment against the wise; not only because this is a trespass committed by the wise, and that therefore she is punishable for her own act, which is injurious to another; but because, where the wise is found guilty of the ejectment, she must have obtained that unlawful possession, either jointly with her husband, and then it survives, or else she had the whole possession in her own right; and in either case the plaintist may punish her, and recover the possession, which is wholly in her on the death of her husband. Rel. Rep. 14. Cro. Jac. 356.

It was formerly held, that if a demise was laid in the declaration for a longer term than the lessor had interest in the premisses, the plaintist could not recover. Per Hale. Tr. 27 Car. 2. But upon an objection made at ni. pri. where the demise was laid for for a longer term than the lessor had title; and 2 Leo. 140. Brown 133. were cited in support of it, lord Mansfield said, "there is nothing in the objection, for if the lessor have a title, though but for a week, he ought to recover; for the true question in ejectment is, who has the possessor right. Suppose a person has an interest for three years only, and should make a lease for five, it would be

good for the three years. Bull. Ni. Pri. 106.

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#### Of the Verdict, and Judgment in Eject. MENT.

If plaintiff after issue, and before trial, enter into part, the defendant may at the affizes plead this as a plea puis darrein continuance in bar to plaintiff's action; but it is at the diferetion of the justices whether they will receive it; but if they do, it stops the trial, and the plaintiff is not to reply to it at the affizes, but the judge is to return it as parcel of the re-

cord of ni pri. Yelv. 180. Cro. Car. 261.

The tenant in possession not appearing at the trial to confess leafe, entry and oufler, judgment was entered against cafual ejector. A. an attorney, brought a writ of error in the name of the casual ejector, which he was ordered to nonpros at his own expence, and pay costs; but was excused from farther censure, it appearing that he had been informed by some of the Cursitor's clerks, that such writ of error might be brought. Barnes, 181.

Note, a writ of error will lie on a judgment in ejectment,

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quod recuperet, &c. Carth. 205.

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# Of arresting the Judgment in EJECTMENT.

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IF by any intendment a judgment in ejectment after a verdict can be made good, the court will do it. As where on error brought after judgment for plaintiff, that he recover his terms, when the declaration was on two separate demises, by two different lessors of the very same premisses, and for the very same term; and though objected, that the judgment being to recover his terms in the plural number, was wrong, as both the leffors could not have title to the fame premisses at one and the same time, the court affirmed the judgment. And the chief justice cited a case, Trin. 45 Geo. 2. Fisher and Hughes, where, upon three demiles, by feveral leftors of the same premisses, and judgment as to two demises, was entered for the plaintiff; and as to the other, for the defendant; the objection being, that there was judgment both for the plaintiff and defendant, yet the court held the judgment right. I Wilf. I. S. C. Stra. 1180.

So, where after judgment to recover his term, when there were two demises of different lands, and error brought, and objected, that the judgment being in the singular number to recover his term, was wrong. Per cur. The judgment is to recover his term de & in tenementis prædict, which reddendo singula singulis is well enough, for there is but one term in each part of the premisses. Stra. 835.

But where on motion in arrest of judgment, the words in the declaration being one messuage or tenement, which is too uncertain, as tenement is all a man holds, and after judgment, the sheriff cannot tell of what to deliver possession, the court made a rule to stay judgment till cause shewn, and afterwards judgment was arrested. Barnes, 174.

The ejectment was brought for one messuage, with the appurtenances in the parishes of A. or B. or one of them; and though after a verdict for plaintist, judgment was arrested for the uncertainty. Barnes, 184.

The English notice at the foot of the declaration, was subscribed by the nominal plaintiff, instead of the casual ejector, which the court held bad, and discharged the rule for judgment. Barnes, 172. The same case in B. R. H. 2 Geo. 2. Barker v. Merifield.

After verdict for plaintiff in ejectment, and motion in arrest of judgment, because the demise was laid on a day not then arrived, held to be no objection. Burr. 4 pt. 1159.

## Of arresting the Judgment in EJECTMENT.

The death of the plaintiff in ejectment, is no ground for a

motion to arrest the judgment. I Mod. 252.

In ejectment against two defendants, the declaration was, that be entered instead of they entered; and, on motion in arrest of judgment, the court at first held it to be bad, but afterwards ordered it to be amended on the authorities of Cro. Jac. 306. And plaintiff had judgment. Salk. 48.

Trespass and ejectment by original; motion in arrest of judgment upon a fault in the original [for a bad original is not helped by verdict;] but the master certifying there was no original at all, the plaintiff had judgment, though in

his declaration he recited an original. I Mod. 3.

The plea of the landlords and tenants; who had appeared with the Filazer, and entered into the common rule, was left in the prothonotary's office, entitled with the true name of the cause; but, by mistake, in the plea was inserted the name of the plaintiff's lesser (as complaining) instead of that of the nominal plaintiff; upon which the attorney, conceiving the plea to be a nullity, signed judgment against the casual ejector; which judgment, upon application to the court, was set aside with costs. Barnes, 191.

Where judgment is obtained against the casual ejector, and a trial is not lost, the courts will, on the defendant's application, his payment of costs, and entering into the common rule, to confess lease, entry, and ouster, set aside such judgment in ejectment, (as well as in other actions) and not put the tenant to the charge, inconvenience, and hazard of recovering back his possession, by another action,

Stra. 975.

There is no distinction between a judgment in ejectment upon a verdict, and one by default; in the former, the plaintist's right is found, in the latter, confessed. Burr, Rep. 4 pt. 667.

A regular judgment in ejectment may be set aside both in

B. R. and C. B. Stra. 975.

In the declaration in stating the demise, the ville was omitted where the lands laid, but in the subsequent part, the ejectment was stated to have been at Haswell. And it being moved in arrest of judgment, the court held that it amounted to a sufficient certainty, that the lands lay in the ville of Haswell, and discharged the rule. 2 Blacks. Rep. 706.

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If the plaintiff has judgment to recover his term, he may enter without suing out an habere facias possessionem; for where the land recovered is certain, the recoveror may enter at his own peril, and the affistance of the sheriff is only to preserve the peace. 2 Sid. 156. 1 Rol. Rep. 213. Nov 71. Palm. 263.

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But although, after judgment, the plaintiff is entitled to and may sue out an habere facias possessionem, yet if he neglect to sue out execution within a year after the judgment, he must bring a scire facias to revive the judgment \* as in other cases, otherwise the court will award a restitution quia erronice emanavit.

The defendant in ejectment died, and a scire facias went out against the tertenants of the land, which was demurred unto, for that the heir was not named, nor was it alledged that any strangers had intruded; but the court ruled it well, for the heir may come in as tertenant. Sid. 317. 2 Keb. 143. But for this, vide Cro. Car. 295. 312. Cro. Jac. 506. 2 Brown, 145.

In ejectment, there was judgment against the testator, and a sci. fa. against the executor, without naming him terre-tenant; and it being objected, that in ejectment the defendant is supposed to be a disseisor, and that the lands descend to his heir at law, the plaintiff took out a new scire facias, and amended the fault. Carth. 2.

Judgment was for two messuages, and, after the year, a scire facias upon it recited a judgment of one messuage only; to which nul tiel record being pleaded, it was moved to amend it. But denied. For there may be such a judgment; and this does not appear to be erroneous upon the face of it. 6 Mod. 310.

But if the plaintiff hath a judgment, with stay of execution for a year, he may, after the year, take out his execution without the fcire facias, because the delay is by

<sup>\*</sup> It feems to have been doubted, whether a fci. fa. lay to revive a judgment in ejectment after the year, because by the common law it lay only in real actions; and at the time of Westm. 2. c. 45. which extends it to personal actions, the term or possession was not recovered in the action of ejectment; but it seems now agreed, that a scire facias lies to revive the judgment in this action after the year, as well as in others. Sid. 351. 1 Salk. 258. Ld. Ray. 806. Comb. 250. 2 Keb. 307. Skin. 427.

confent of parties, and in favour of the defendant; and the indulgence of the plaintiff shall not turn to his prejudice, nor ought the defendant to be allowed any advantage of it, when it appears to be done for his advantage, and at his instance. Rol. Rep. 194. Salk. 258. 6 Mod. 288. Barnes, 132. 2 Barnes, 165, 166. 172. Stra.

But it feems this delay of execution, being only the compromise or agreement of the parties, is never entered on the roll; and therefore, after the year, the plaintiff ought to move the court for a scire facias, least the execution should be suspended quia erronice after the year, without the feire facias. Keb. 785. 6 Mod. 288. and the above au-

So if the defendant brings error after the year, after judgment given, and afterwards becomes nonfuit, the defendant in error may fue out execution without a scire facias.

Raym. 807. Cro. El. 416. 5 Co. 88.

But if there is an injunction out of Chancery, he cannot take out execution after the year, without a scire facias, because the courts of law do not take notice of Chancery injunctions, as they do of writs of error; for the latter is a judicial proceeding, appearing to them upon record; whereas, an injunction is not a matter of record, fo as the court can take notice of it. Stra. 301.

But in the case of an injunction, the party may take out his execution within the year, and continue it down by vic. non misst breve, and it will be no breach of the injunction, which is only to prevent an actual execution. Salk. 322.

pl. 9. 6 Mod. 388.

The plaintiff may enter, pending a writ of error, upon a judgment in ejectment, if he finds the possession empty; for the writ of error binds the court, but not the party. But then he must take care that he do not enter with force.

Badger v. Lloyd. Holt 199. Ld. Raym. 808.

After verdict for plaintiff, motion for leave to take out execution against the casual ejector, non obstante a writ of error brought by the defendant. Rule discharged. Per cur. In cases where the landlord is admitted to defend without the tenant, the reason for judgment against the casual ejector, per statute, is, that under it, after an end of the fuit, plaintiff may obtain possession of the premisses sued for, which he could not do by virtue of a judgment against a person out of pollession. But where a writ of error is brought, there

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there is not the least reason to give plaintiff leave to take possession, till after a determination in error. Barnes, 208. Like motion denied in B. R. Jones v. Edwards. Stra. 1241.

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D. the landlord, was made defendant by rule, the tenant in possession not appearing; after verdict for plaintist, defendant, the landlord, brought a writ of error, and served plaintist's attorney with a rule, to be present at taxing costs. Plaintist signed no judgment on the verdict, but moved the court, producing the postea; and obtained a rule of course, for leave to take out execution against the casual ejector. Defendant perceiving this, allowed and served notice of his writ of error, and moved to stay proceedings on the Judgment. Per Cur. The writ of error is no supersedeas before delivery to the clerk of the errors, to be allowed \*; vide Meriton v. Stephens. Mich. 15 Geo. 2. where, so far as execution had gone, it stood, and surther proceedings only were stayed. In this case, the writ of hab. sac. possessionem was executed. No rule. Sykes on dem. Oates and others v. Dawson. Barnes, 209.

Rule to shew cause why an hab. fac. possessionem should not be set aside, and possession restored. Plaintist obtained a verdict at the assizes. I July, defendant brought error, which was allowed 29 Ost. after; but entered into no recognizance, nor put in bail thereon, plaintist not having got costs taxed on the sinal judgment (without which, the measure or quantum of the recognizance could not be fixed.) Plaintist, for want of the recognizance required by the statute, or bail within four days, took out a writ of hab. sac. poss. and by virtue thereof, on the 4 Nov. took possession of the premisses, which the court held to be regular. Defendant should have applied to stay execution, and then the court would have obliged plaintist to have procured his costs to be taxed: the writ of error is no supersedeas without bail. A judge would have taken bail if applied to. Rule discharged. Barnes, 212.

Cause was tried at the summer affizes. October 27, after defendant allowed a writ of error, and served plaintiff's attorney with notice of the allowance; the writ of error was returnable in fifteen days of St. Martin. Judgment was not

figned

But in B. R. it is a supersedeas to an execution (not begun to be executed) as soon as allowed, and without notice. Salk. 321. Vide 1 Vol. title of superseding, execution.

figned till after the return, viz. Dec. 26, and then plaintiff took possession. And on motion to set aside, the court held, that the writ of hab. fac. poss. was irregular, and ordered possession to be restored; plaintiff's attorney to pay costs, and, by consent, no action to be brought. The judgment being of Michaelmas term, was affected by the writ of error. Barnes, 260.

No new ejectment shall be brought by the defendant after judgment against him, till he has quitted the possession, or the tenants have attorned to the plaintiff, so as he be in

possession, and the defendant out. Salk. 258.

A writ of possession is to the following effect:

GEORGE the third, &c. To the fheriff of --- greeting. Whereas A. B. lately in our court, before us [or before our justices, if in C. B.] at Westminster, by bill without our writ, and by the judgment of the same court, [if by original, fay by the judgment of the same court ] recovered against C. D. his term yet to come of and in one meffungt, &c. with the appurtenances, lituate, lying, and being at of \_\_\_\_\_ demised to the said A. to hold and enjoy to the faid A. from the day of then last past, unto the full end and term of ---- years thence next enfuing, and fully to be compleat and ended; by virtue of which faid demise, the said A. entered upon the faid tenements, with the appurtenances, and was possessed thereof, until the faid C. afterwards, to wit, on the day of \_\_\_\_ in the \_\_\_ year aforesaid, with force and arms entered into the faid tenements, with the appurtenances, and him the faid A. from his farm aforefaid ejected, put out, and amoved, his faid term therein not being expired; and him so ejected, put out, and amoved from his possession of his said farm, hath withheld, and still doth withhold, whereof the said G is convicted, as appears to us upon record. Therefore, we command you, that without delay you cause the said A. to have his possession of his farm aforesaid, yet to come of and in the tenements aforesaid, with the appurtenances, and how you shall execute this our writ, make appear to us for to our justices] at Westminster, on, &c. [the return] and have then there this writtenests but a made also art mon !

Witness, &c. what att about abromat fluminia and Maidw M.

For other forms, fee the various books of entries.

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The writ of possession has relation to its teste, though it be not actually sued out till after the death of the lessor of the plaintiff; yet if tested before his death it is regular. Burr.

Rep. 4 pt. 1971.

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The words of the writ are quod habere facias possessionem; to that there must be a full and actual possession given by the sherist, and consequently all power necessary for this end must be given him; and therefore if the recovery be of a house, the sherist may justify breaking open the door, if he be denied entrance by the tenant, because the writ cannot be otherwise executed. 5 Co. 91. b. Law of Ejesim. 108. The sherist is to give possession, upon the plaintist's shewing, and at the plaintist's peril; who is, at his peril, to take possession of no more than he is entitled to. Vide Burr. Rep.

pr. 2673.

An iffue has been directed to try whether the sheriff had elivered possession properly according to the recovery. Ibid. If plaintiff recovers several messuages in the possession of inferent persons, the sheriff must go to each house, and deliver the possession thereof; and this is done by turning the mants out of each of the houses; for the delivery of one nessuage in the name of all, is not a good execution of the mit; because the possession of one tenant is not the possession of another; but each hath his several possession. Law & Ejetsm. 108.

If the theriff turns out all perfons he can find in the house, gives the plaintiff, as he thinks, quiet possession; and, fer the fheriff is gone, there appears fome persons to be rking in the house, this is no good execution; and therehe the plaintiff shall have a new habere facias possessionem; cause he never had execution. Upton v. Wells. Leon. 145. If the execution goes to the sheriff for twenty acres, the end must give twenty acres, according to the common mation of the country where the lands are. Roll. Rep. 410. If the recovery is of land, and the plaintiff demanded ore than he recovered, the fheriff used formerly to give office of one or two acres in the name of all, which the aintiff recovered, in order to be fafe from an action of epals, by giving that which was not recovered; but now, this day, in the case of recovering less than was demandthe plaintiff usually gives the sheriff security to indemnify m from the defendant; and then the sheriff gives execution all which the plaintiff demands under his judgment. Law Eject. 110. Vol. II. Judg-

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Judgment was for one meffuage, and the fheriff delivered possession of two [as it was said] a lath and plaister being run up the middle of the messuage, and occupied by two families, but it was held a good execution. Anon.

Ejectment was for five eights of a cottage, and the sheriff gave possession of the whole to the plaintiff, who was tenant in common. Per cur. This is wrong, the writ ought to have purfued the verdict; let there be a rule upon the sheriff and the lessor of plaintiff, to restore the tenant to three eight parts of the premisses, otherwise he will be forced to bring another ejectment for the same. 3 Will. 49.

A moiety may be recovered in ejectment for an entirety. A rule was made for the leftor of plaintiff and his attor. ney, to pay the tenant his costs of the application, and restore his goods, they having entered a general judgment, and taken out a general writ, and thereby taken possession of the whole premises and removed the goods, when the defendant had obtained a rule to defend for two thirds. Barnes, 191.

A judgment irregularly obtained was let aside, and the possession given upon the execution ordered to be restored But the leffor of plaintiff (who held the possession) abscording, the rule became ineffectual; whereupon it was moved, on behalf of the late tenants, for a writ of restitution, which the court awarded accordingly. Barnes, 178.

In ejectment after a verdict, and writ of error allowed, i no recognizance is entered into, nor bail put in, the plaintiff may fue out his execution. Suppl. to 2 Barnes, 30. Asto bail on error in ejectment, vide the stat. 16, 17 Car. 2. a.l. and 4 Burr. 2501. and post title Bail in error, where requi

An attachment was granted absolute in the first instance against the tenant in possession, on affidavit that he had been ferved with a rule of court, made absolute, for delivering the possession, and had refused so to do. Davies ex demis Povey v. Doe. Eaft. 13 Geo. 3. 2 Blackf. Rep. 892.

I the defendant himself, and where by a stranger If his the

dendant, and the writ not returned, the plaintiff machine

ew babere faciar or an attachment, because the defendant

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Of quieting the Plaintiff, and of relieving him when his Possession is disturbed.

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THE writ of execution in ejectment is only returnable at the instance and election of the plaintiff, for the court will not direct the writ to be returned at the instance of the defendant; which feems to be left to the choice of the plainiff, that he may take what is most for his advantage, in order whave the full benefit of his judgment; and the way to that is to fuffer him to renew the execution at his pleafure, till a new execution be had; but he cannot renew execution, after he has once procured the writ of possession to be returned and filed; because it then appears on record, that the plaintiff hath had the benefit of his fuit, and then to award a new execution would be astum agere, and consequently superfluous; and therefore the court will never oblige the Sheriff to make areturn, but at the plaintiff's desire. Rol. Abr. 386. 2 Keb. 245. Rol. Rep. 353. 1 d. Raym. 252. 346. 482. 718. 725. 1072. Carth. 496. Salk. 260. pl. 1. 5 Mod. 443.

If the writ is once returned, though not filed, it feems no new babere facias shall issue, because when the return is made thecomes a record, which the court then is entitled to. 2 Brown 216.

When the writ is not returned, in order for a new writ, here must be a suggestion, that vicecomes non mist breve; but his new writ cannot iffue, till the return of the first writ is out; because till that return is past non constat to the court, but that the Sheriff may do his duty, and the plaintiff thereby ave the full benefit of his judgment, and fo no new writ netellary. Palm. 289.

The writ is not executed, nor the execution compleat, If the Sheriff and his officers are gone, and the plaintiff left a quiet possession. If the officer is disturbed in the execuion of the writ, on affidavit thereof, the court will grant an transper, because the writ is the process of the court, and the isturbance is a contempt of its authority. 6 Mod. 27.

But after possession once given, and a disturbance thereof, the law makes a difference where the plaintiff is turned out by the desendant himself, and where by a stranger: If by the desendant, and the writ not returned, the plaintiff may have a sew babere facias or an attachment, because the desendant inself shall never keep that possession, which the plaintiff is mittled to, and has recovered by due course of law; but if the is turned out by a stranger after execution executed, the laintiff is put to his new action upon an indictment of forcible. But after poslession once given, and a disturbance thereof,

Of quieting the Plaintiff, and of relieving him when his Possession is disturbed.

ble entry, where the force will be punished, because the title was never tried between the plaintiff and a stranger; and the stranger may claim the land by title paramount the plaintiff, or he may come in under him, and then the recovery and execution in the former action ought not to hinder the stranger from keeping that possession which he may have a right to; and if the law were otherwise, a plaintiff, by virtue of an habere sacias, might turn out his own tenant, who came in after execution executed; whereas the possession was given him against the defendant only, and not against others not party to the suit. Ratcliff v. Tate. Keb. 479. I Salk. 321.

In the case of Fortune and Johnson, on motion for an at-

In the case of Fortune and Johnson, on motion for an attachment against Johnson, for ejecting the plaintiff who had been put into possession by an habere facias, the court made no rule, because it appeared that Johnson claimed under an elder judgment, and it was title against title, and therefore

left them to take their course at law. Style 318.

The plaintiff had judgment, but by agreement afterwards, the defendant was to hold for the residue of his term, and accordingly held for some time; then the plaintiff took out an habere facias, and executed it: upon which the desendant moved for restitution on the agreement, which the court resulted, and lest him to his action on the agreement, for the judgment was ruled absolutely. But if the judgment had been with a cessar execution till such a time, there is the plaintiff takes out execution within the time, the desendant shall have restitution, because the judgment was entered with the limitation. Style 408. Law of Ejest. 113.

But quære, how does this appear to the court, fince it seems a cessat executio is never entered on the roll? The difference feems to be between a judgment by confession, and on verdid, where the former is given with a cessat executio; and there, if the execution is taken out contrary to the agreement, the court will set it aside, and punish the attorney: but where judgment is given on verdics, the verdics is the soot and ground of the judgment, and the court will not take notice of agreements between the parties, but leave them to their

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ONE great advantage attending this action is, that a man may have a remedy toties quoties, in being allowed to bring as many ejectments as he pleases [10 Mod. 1.] which has sometimes proved a great mischief, but is still without remedy; for though it has fometimes been attempted in chancery, after three or four ejectments, by a Bill of peace to establish the prevailing party's title, yet it hath always been denied to alter the course of law, for that every termor may have an ejectment, and every ejectment supposes a new demise, and the costs in ejectment are a recompence for the trouble and expence to which the possessor is put. But where the fuit begins in Chancery for relief touching pretended incumbrances on the title of lands, and the court has ordered the defendant to pursue an ejectment at law, there, after one or two ejectments tried, and the right fettled to the fatisfaction of the court, the court hath ordered a perpetual injunction against the defendant, because there the suit is first attached in that court, and never began at law; and fuch precedent incumbrances appearing to be fraudulent, and inequitable against the pollession, it is within the compass of the court to relieve against it.

Formerly if one had a verdict in ejectment, and costs taxed, and an attachment issued for the nonpayment of those costs, the defendant should not have an ejectment in the same court against the plaintiff till those costs were paid, but he might proceed in another court; and the reason was, because the court would have obedience paid to their rules; but another court could not take cognizance of the rules of a distinct court. Sid. 279. 8 Mod, 225. Stra. 548. 554.

But where H. brought an ejectment in C. B. and at the affizes was nonfuited, and cofts were taxed on the nonfuit, and then he brought a new ejectment in C. B. and upon a rule being there made to flay proceedings till the cofts of the first nonsuit were paid, he brought an ejectment in B. R. that court stayed proceedings there also, upon producing the rule of the court of C. B. and made a like rule there. 2 Barnes, 107: 1 Salk. 255.

Now all the courts confider a former ejectment in another court, as one in the fame court, and will flay proceedings in a fecond, till the costs of a former are paid. Barnes, 133.

2 Blacks. Rep. 1158.

No new ejectment shall be brought by the defendant after recovery against him, till he has quitted the possession, or

# Of bringing a new or fecond EJECTMENT.

the tenants have attorned to the plaintiff; so that he be in possession, and the defendant not. Salk. 258. pl. 12.

The court would not stay proceedings in one ejectment till the event of another was determined. Barn. K. B. 47.

But proceedings in a second ejectment were stayed till the special verdict in the former was determined. And. 298. 2

Stra. 1105.

F. obtained judgment on a verdict on his demise against Lady G. Upon this she brought a writ of error, and pending the same, delivered a declaration in ejectment to the tenants in possession upon her own demise. And now the plaintist moved for the common rule, and it was denied. For per Holt, no new ejectment shall be brought by desendant, after recovery against him, till he has quitted the possession, or the tenant has attorned to the plaintist. For if the plaintist gets judgment in this last ejectment, and the first judgment is affirmed, then he renders it needless and ineffectual by this ruling judgment, upon which he takes out execution to recover his possession. The rule for judgment against the cassual ejector is in the power of the court, upon what terms the court thinks sit. My lady must shew us a different title, or we will not grant the rule.

The same thing was done in another case, Hil. 2 Ann. B. R. where the desendant in ejectment, pending a writ of error, delivered a new declaration in ejectment, and the court was moved that the costs might be first paid. The court thought the payment of costs suspended by the writ of error,

But where the judgment was against the cafual ejector, his

in respect for the methe profits without an actual entry - b.

the where the judgment is against the conant in possession of he entered into a rule; for then he is estopped, the

and entered into, it was held that the offer cannot man

but stayed all things for the reasons before given,

In case the plantiff can prove his title accrued before amit to describe amit to have the algorithm to have the agond the ag

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# Of recovering the MESNE PROFITS.

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BEFORE the time of Hen. 7. plaintiffs in ejectment did not recover the term; but until about that time the mesne profits accruing to the ejector, were the measure of the da-mages given the ejected. So that by the old law and practice in ejectment, the plaintiff recovered nothing but damages, no term was recovered; but when it became established that the term should be recovered, the ejectment was put into the form of a real action; the proceeding was in rem. and the thing itself; the term only then was recovered, and nominal damages, but not the mesne profits; whereupon a mode of recovering the melne profits [after the ejectment had been tried, and the plaintiff had recovered possession in an action of trespals was introduced, and grafted upon the present fiction in ejectment; and the action of trespass for the mesne profits is put in the place of the ejectment at common law, which was atrue, and not a fictitious action, and nothing more than an action of trespass. Vide 3 Wilf. 120. and Astin v. Parker, Burr. 4 pt. 688.

Actions for mesne profits tend to create double expence; the plaintiff should be ready at the trial of ejectment to prove

It was settled by all the judges in Assin v. Parker, 32 Geo. 2. on a case reserved, that in trespass against the tenant in posfession for mesne prosits, either by the lessor or the nominal plaintist, after a recovery in ejectment, the plaintist need not prove a title; but it is sufficient to produce the judgment in ejectment, and the writ of possession executed, and to prove the value of the prosits, and thereupon he shall recover from the time of the demise laid in the declaration. Burr. Rep. 4 th. 668. Barnes, 472.

But where the judgment was against the casual ejector, and no rule entered into, it was held that the lessor cannot maintain trespass for the mesne prosits without an actual entry—but aliter where the judgment is against the tenant in possession, and he entered into a rule; for then he is estopped, Oct. Stra. 5.

In case the plaintiff can prove his title accrued before the time of the demise, and prove the desendant to have been longer in possession, he shall recover antecedent profits; but then the defendant may controvert the title, which he cannot if the plaintiff goes for no longer time than is contained in the demise: because being tenant in possession he must have been served with the declaration, and therefore the record is against him conclusive evidence of the title, But against a

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# Of recovering the MESNE PROFITS.

precedent occupier, the record is no evidence, and therefore against fuch a one, it is necessary for the plaintiff to prove his title, and also to prove an actual entry: for trespass being a possession cannot be maintained without it. Vide Bull. No. Pri. 87.

But note: Should the plaintiff in an action of trespass for mefne profits go back for damages till the time his title ac. crued, and the defendant have been in possession, he may pro. tect himself by the statute of limitations, from all damages,

but for the last fix years. Bull. Ni. Pri. 88.

An action for melne profits may be brought in the name of either the nominal plaintiff, or his leffor, against the tenant in possession; whether he be made party to the ejectment, or suffers judgment to go by default.

If the action be brought, after judgment by default, against the cafual ejector, it is usual for the plaintiff to recover the costs of the ejectment, as well as the melne profits. Bull.

Ni. Pri. 88.

And in case the action be brought by the nominal plaintiff in ejectment, the court on application will flay the proceedings therein till fecurity is given for the costs. Agreed. Ibid.

If one tenant in common recovers in ejectment against another, he may have trespass for the mesne profits. 3 Will. 118.

The defendant cannot pay money into court in an action for melne profits after recovery in ejectment. 2 Will. 115.

In an action for mefne profits, the parcels must be men-

tioned, or defendant may plead the common bar.

rnam; for the defendant thall not ber can

In actions for mefne profits, nothing but the judgment in ejectment, and execution thereupon, and the value of the mesne profits, can be given in evidence, and not the title;

otherwise trials would be infinite.

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If in ejectment there is a verdict for plaintiff, and defendant bring error, and enters into recognizance to pay coffs in case of nonfait, &c. pursuant to the statute of Charles the Sitond; and he be nonfuited, &c. defendant in error need not bring a scire facias, or debt on the recognizance, but may he out an elegit, or writ of enquiry, to recover the mefne profits fince the first judgment in ejectment. Short v. Heath, Mich. eplevit, and offers to plead non co

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#### Of the Action of REPLEVIN.

GODS, &c. are only replevisable when they have been taken by way of distress; and therefore repleving is a remedy grounded upon a distress, being a re-deliverance of the goods or cattle distrained to the first possession, on security given by him to try the right, and to re-deliver the things distrained, if judgment be given against him. Co. Lit. 145.

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The action of replevin is of two forts; 1. In the detinet.
2. In the detinuit; and may be brought in any case where a man has his goods or cattle taken from him by another, by way of distress.

Where the party has had his goods re-delivered to him by the sheriff upon a writ of replevin, or upon a plaint levied before him, [which by the statute of Marlbridge 52. Hen. 3. the Sheriff may take out of the county court, and make replevin presently] the action is in the detinuit, wherefore he detained the goods, &c. but where the Sheriff has not made such replevin, but the distrainer still keeps possession, the action is in the detinet; wherefore he detains the goods, &c. However, of late years, no action has been brought in the detinet, though there is much curious learning in the old books concerning it.

The advantage the plaintiff has in bringing an action of replevin in the detinet, instead of an action of trespass de bonis afportatis, is, that he can oblige the defendant to redeliver the goods to him immediately, in case upon making his avowry they appear to be replevifable; but as he may more speedily have them delivered immediately after they are distrained, by application to the Sheriff, the action in the detinet has fell into disuse, and is never brought, unless the distrainor has essoined the goods, so that the sheriff cannot get at them to make replevin; and then it may be brought in the detinet: Whereupon, after avowry made, the plaintiff may pray that the defendant gage deliverance; or he may, upon the return of elongavit to the pluries writ of replevin, have a writ to the Sheriff, commanding him to take other beafts, &c. of the defendants in withernam; but then, if the defendant, before the return of the withernam, appears to the writ of replevin, and offers to plead non cepit, it shall stay the withernam; for the defendant shall not be concluded by the return of the elongavit, because the Sheriff can make no other return, where he cannot find the thing to be replevied.

#### Of the Action of REPLEVIN.

The word withernam, is a term, which fignifies a few cond or reciprocal diffress, in lieu of the first, which was essoned. The writ of capias in withernam, is a writ therefore to the Sheriff, commanding him to take other goods, &c. of the distrainors, in lieu of the distress formerly taken and essoned or withheld from the owner. So that here is now distress against distress, one being taken to answer the other by way of reprisal, and as a punishment for the illegal behaviour of the original distrainor. For which reason, goods taken in withernam, cannot be replevied, till the original distress is forthcoming. Ld. Raym. 475.

If the person taking the goods claims property in them before the Sheriff, he cannot make replevin of them: But then the plaintiff may sue out a writ de proprietate probanda, upon which the Sheriff must have an inquest of office; and is, upon such inquisition, the property is found in the plaintiff, the Sheriff shall make replevin; otherwise not. But though the property is not found in the plaintiff, he is not concluded, for he may still have his action of replevin in the detinet, or of trespass. But if in an action of replevin the defendant plead property, and it it be found for him, the

plaintiff is thereby concluded.

Therefore, he that brings replevin must have an absolute, or at least a special property in the thing distrained; and therefore, several men cannot join in a replevin, unless they be joint-tenants, or tenants in common. Co. Lit. 145.

Executors may have a replevin of a taking in vita testatoris; for this affirms the property to remain. Bro. Rep. 59,

Sid Sa

So if the cattle or goods of a feme sole be taken, and she afterwards intermarry, the husband alone may have replevin; but if they join, and there be a verdict for them, judgment will not be arrested, because the court will presume them jointly interested (as they may, if a distress be taken of goods, of which a man and woman were joint-tenants, and afterwards intermarry:) the avowry admitting the property to be in the manner it is laid. Vide Bull. Ni. Pri. 53.

Note, When an act of parliament orders a distress and sale of goods, this is in nature of an execution, and replevin does not lie,

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# Where REPLEVIN may be brought.

THE action of replevin may be brought either in B. R. or C. B. by writ made returnable therein; but the action is most usually commenced in the county court, though by special custom a replevin may be brought in an bundred court, &c. or other court of record, that may hold plea thereof. Vide Salk. 580. 2 Instit. 139. 3 Mod. 56, &c.

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A replevin lies two ways in a county court, by writ and by plaint. However, it is seldom brought by writ there, because the plaintiff may have his goods or cattle restored to him more speedily, by levying his plaint there, according to the statute of Marlbridge 52 Hen. 3. c. 21. which gives a replevin by plaint, either in or out of court; till which statute, the Sheriff could not replevy by plaint. For, at common law, the Sheriff could replevy by writ only, and that in his county court. Vide Ld. Raym. 219.

If the replevin is by writ there, the writ issues out of Chancery, and is in the nature of a justicies. 2 Instit. 240.

And if he does not return it, or does nothing upon it, the plaintiff may have an alias, in which is inferted usually this clause, that he make replevin, vel causam nobis significes. F. N. B. 68. E. And after that a pluries.

If the Sheriff makes replevin, he need not return the writ; but if he does not, he ought to return the cause. 2 H. 7. 5. b.

And if he does not, an attachment lies against him to the coroners, commanding them to attach the Sheriff for his contempt, and in the interim make replevin. Reg. 81.

To any of these writs, the Sheriff cannot return a mandavi ballivo, &c. For by Westm. 1. 17: the Sheriff ought immediately to enter the franchise, and make deliverance. F. N. B. 58. F.

If he does not replevy, and makes any other return, the plaintiff thall have a capias in withernam; and after that, an alias, and a pluries capias in withernam.

But as replevin by plaint is the most usual and expediious, I shall shew how to proceed therein.

Upon plaint made to the Sheriff, of goods or cattle diffrained, he, by parol or precept, may, by his bailiff, replevy them. 2 Instit. 139. F. N. B. 69. E. Per Lit. 9 Edw. 4. 48. b.

And it is not necessary for the plaintiff to stay till the pounty court is held, before he makes plaint, if the plaint is afterwards entered there. *Ibid*. And the Sheriff may make deligrance, though the goods or cattle are above the value of 40 s.

By

## Where REPLEVIN may be brought.

By flat. 1 & 2 P. & M. c. 12. feel. 3. "For the more speedy delivery of cattle distrained, the Sheriff must appoint four deputies at least in his bailiwick, dwelling not above twelve miles one from the other, to make replevins; who have authority in his name, to make replevins and deliver. ances, &c."

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Note, To impound cattle in another county, does not make the distreinor a trespasser, though it may subject him to

a penalty on this statute, I & 2 P. & M.

Though the Sheriff may grant replevins by plaint, and may proceed thereon in the county court, yet if any thing touching the freehold come in question, or ancient demense be pleaded, the Sheriff can proceed no further: nor can any such proceedings be carried on in the hundred-court, court-baron, or any other court claiming a jurisdiction herein by prescription.

4. Hen. 6. 30. 2 Hen. 7. 6. Co. Lit. 145.

So when the king is party, or the taking is in right of the crown, the Sheriff is to furcease. Bro. Repl. pl. 3. Brown, 33.

the fuir is in any court of second; and if it is in any court not of record, as the county court, hundred court, Esc. he may have a precept in the nature of a feire facial against thele pledges, though not a feire facial: because a feire facial ought to be grounded on a record. Ld. Raym. 758.

But as therists became remils in their duty, and often needled taking their pl dges pro retorns babendo; or if any were taken, for the most part they were found to be indicent and arresponsible people; the state of 11 Geo. 2. c. 10. 23. for the better securing the payment of reuts, and preventing frauds by tenants, enacts, " That to prevent vexations repleving of diffrestes taken for rent, all theriffs and other officers, having authority to grant repleving, may and thall, in every replevin of a differes for rent, take in their own names, from the plaintiff, and two refponfible perfons as fureties, a bond in double the value of the goods diffrained fuch value to be aftertained by the oath of one or more credible witness or witnesses not interested in the goods or gistress, which outs the person. granting such repleyin is hereby authorized and required to adminifier | and conditioned for profecuting the full with effect and without delay, and for duly retarning the O goods and chattels diffrained, in case a return that be avaided a clope any left cruyee be rade or the dutrels

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UPON making replevin, the sheriff ought to take two kinds of pledges—viz. pledges of prosecution by the common law, and pledges pro retorno babendo, according to the statute Westm. 2. c. 2. by which it is provided, "That sheriffs or bailists from thenceforth shall not only receive of the plaintist, pledges for the pursuing of the suit, before they make deliverance of the distress, but also for the return of the beasts, if return be awarded; and if any take pledges otherwise, he shall answer for the price of the beasts; and the lord that distrains shall have his recovery by writ, that he shall restore to him so many beasts or cattle; and if the bailist be not able to restore, his superior shall restore."

The pledges for prosecution in this, as in all other actions, are now become nominal persons; but the pledges providerno habendo, ought to be real and responsible persons; for an action lies against the sheriff if he omits to take these pledges, or if he takes those that are insufficient; for the party may have a scire facias against the pledges, where the suit is in any court of record; and if it is in any court not of record, as the county court, hundred court, &c. he may have a precept in the nature of a scire facias against these pledges, though not a scire facias: because a scire facias ought to be grounded on a record. Ld: Raym. 278.

Comb. 1, 2. 593.

But as sheriffs became remis in their duty, and often neglected taking these pledges pro retorno habendo; or if any were taken, for the most part they were found to be indigent and irresponsible people; the stat. of 11 Geo. 2. c. 19. 1. 23. for the better fecuring the payment of rents, and preventing frauds by tenants, enacts, " That to prevent " vexatious replevins of diffresses taken for rent, all sheriffs " and other officers, having authority to grant replevins, " may and shall, in every replevin of a distress for rent, " take in their own names, from the plaintiff, and two re-" sponsible persons as sureties, a bond in double the value " of the goods distrained [such value to be ascertained by " the oath of one or more credible witness or witnesses not " interested in the goods or distress, which oath the person " granting fuch replevin is hereby authorized and required " to administer] and conditioned for prosecuting the suit " with effect and without delay, and for duly returning the " goods and chattels distrained, in case a return shall be " awarded before any deliverance be made of the diffress;

## Of finding Pledges in REPLEVIN.

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and that fuch theriff, or other officer as aforefaid, taking at any fuch bond, shall, at the request and costs of the avowant, or person making conuzance, assign such bond e to the avowant or person aforesaid, by indorsing the same, and attesting it under his hand and feal, in the presence " of two or more credible witnesses; which may be done without any stamp, provided the affignment, so indorsed, " be duly stamped before any action be brought thereon; and if the bond so taken and assigned be forfeited, the avowant, or the person making conuzance, may bring an action, and recover thereupon in his own name; and the court, where fuch action shall be brought, may, by a rule of the same court, give such relief to the parties, upon " fuch bond, as may be agreeable to justice and reason; and fuch rule shall have the nature and effect of a defeazance to fuch bond."

An action on the case was brought against a sheriff for taking insufficient pledges upon a replevin; to which he pleaded not guilty; and a verdict being found against him, and a judgment given thereon in the court of C. B. on a writ of error in B. R. it was objected, 1. That an action on the case was not the proper remedy; 2. Supposing such action lay, that there ought to have been a fcire facias first fued out against the pledges. As to the first, the court held, that the party distraining has, by the stat. Westm. 2. an interest in the pledges; and if the sheriff omits to take fuch, or, which is the fame thing, takes infufficient ones, he is aggrieved, and consequently entitled to his action.— 2dly, That though a scire facias may be brought against the pledges, yet it does not follow from thence, that an action does not lie against the sheriff; and such scire facias, which is only to certify the sufficiency of the pledges, is the less necessary in the present case, such insufficiency being fet forth in the declaration, and found by the verdict. Hil. 13 Geo. 2. Pattifon and Prowfe.

Note, In such action against the sherist, some evidence must be given by the plaintist of the insusficiency of the pledges or sureties; but very slight evidence is sufficient to throw the proof on the sherist, for the sureties are known to him, and he is to take care that they are sufficient. Saunders v. Darling and another, Sittings at Westm. Tr. 10 Geo. 3.

In Richards v. Acton. Tr. 18 Geo. 3. C. B. It was held, that the high fheriff, and under-sheriff, and replevin clerk, are all answerable to the defendant in replevin for the suf-

# Of finding Pledges in REPLEVIN.

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the fareties are known to

ficiency of the pledges, de retorno habendo. 2 Blackf. Rep.

12200 efter bas from In the foregoing case of Richards and Acton, 2 Blacks. Rep. 1220. The diffress was for rent, and on replevin brought, the defendant had a verdict, with damages and costs to 57 l. 15s. and to the writ of retorno habendo thereupon fued out, the sheriff returned an esloignment; on which application was made to the replevin clerk for the names of the pledges taken, according to the statutes Westm. 2. and 11 Geo. 2. in order to call upon them; but he from time to time evaded and delayed so doing. Whereupon, on application, the court made a rule, on the replevin clerk, the under-sheriff, and county clerk, to discover the names of the pledges taken upon granting the replevin; and to shew cause, why they should not pay the defendant the 57 l. 15 s. recovered, together with the costs of the application. The replevin clerk shewed no cause, but made affidavit of his inability, through illness, to do business; the under-sheriff and county clerk shewed for cause, that they were entirely ignorant of the matter, having nothing to do with the replevin clerk, who was appointed by the sheriff under the stat. I and 2 Philip and Mary. The court then enlarged the rule till the last day but one of the term, and ordered the high sheriff to be added. When it was held, that the sheriff, underheriff, and replevin clerk, are all answerable to the defendant for the pledges. They therefore discharged the rule against the county clerk; but with regard to the other three, they made the rule absolute.

In C. B. defendant moved to amend his return of refalo filed in Mich. term, by adding pledges. In the replevin cause, judgment went for defendant in the plaint, for want of plaintiff's declaring above; and a return. habend. was issued, and an elong. returned thereon. And now this action was brought against the sheriff for not taking pledges: defendant pleaded, that he took a replevin bond, whereto plaintiff demurred. Per. cur. The pledges ought to be recorded in the court below, no affidavit is produced of that said, here is nothing to amend by. Rule discharged. Barnes, 8.

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## Of making REPLEVIN.

UPON plaint being made, and pledges found; or in case the goods, &c. have been distrained for rent, a replevin-bond having been taken, according to the stat. of 11 Geo. 2. c. 19. The sheriff, or one of his deputies, by the stat. 1, 2 P. & M. c. 12. is to make replevin of the goods or cattle distrained, which is done by granting a warrant, which is to the following effect:

Bucks, to wit. A. B. Efq; sheriff of the county afore-faid: To the bailiff of the hundred of Deshorough, in the faid county; and also to John Thomas, and William Jones, my bailiffs, and to every of them, greeting: For as much as C. D. hath found me sufficient security as well to profecute a fuit against E. F. and G. H. for taking and unjustly detaining of his cattle, goods and chattels, to wit, one mare and four colts which the faid E. F. and G. H. have taken and unjustly detained, as is alledged; as also for return thereof, if a return thereof should be adjudged: therefore I command you, and every of you, jointly and feverally, that on the behalf of our lord the king, you replevy, and cause to be delivered to the aforesaid C. D. his cattle, goods and chattels aforefaid; and that the aforefaid E. F. and G. H. give, or cause to be given, sufficient pledges, fo that they may be and appear at the next county court to be holden at Aylesbury, in and for the county of Buch aforefaid, to answer the aforefaid C. D. in a plea of taking, and unjustly detaining, of his cattle, goods and chattels aforesaid; and in what manner you shall execute this precept certify to me at the faid next county court, to be held at the time and place aforefaid, under the peril incumbent, given under the feal of my office this

our fovereign lord George the third, king of Great Britain, &c. and in the year of our Lord 1780."

By John Dixon,

One of the replevinors appointed by the faid fheriff for the faid county of Bucks.

In a replevin in the county court without writ, if the bailiff return to the sheriff that he cannot have view of the cattle, &c. distrained, to deliver them, the sheriff, by inquest of office, ought to enquire into the truth thereof; and

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fit he found by a jury, that the cattle are eloigned, the heriff, in his county court, may award a withernam to take elendant's cattle. And if he will not award a withernam, hen the plaintiff may have a writ out of Chancery, directed to the sheriff, rehearing the whole matter, and commanding him to award a withernam; and if the sheriff then neglects, he plaintiff may have an alias and pluries, and after that an machment against the sheriff. F. N. B. 158.

But if the replevin be in a fuperior court by writ, and the sheriff returns an elongata, then the plaintiff must sue to the superior court, and pursue in withernam out of the superior court, and pursue in withernam out of the superior court, and pursue in withernam, is a term which signifies a reciprocal distress, in lieu of the first which is eloined. And is a command to the sheriff, to take other goods of the distressor in lieu of the distress by the taken and eloined, or withheld from the owner. So that there is then distress against distress; one being taken to answer the other, by way of reprisal, and as a punishment to the illegal behaviour of the original distressor; for which rason, goods taken in withernam cannot be replevied till the

if a sheriff, in making replevin, be shewn a stranger's cattle or goods, and he takes them, trespass lies against him, or otherwise there would be no remedy: for being a franger, he cannot have a writ de proprietate probanda. And were he not entitled to this remedy, it would be in the power of the sheriff to strip a man's house of his goods. It still. Abr. 552. Cam. Rep. 596. But Kekway seems to hold, that the action lies more properly against the person who shews the goods. Kelw. 119.

If the sheriff comes to make replevin of beasts impounded in another man's soil, and the place be inclosed, but has a gate open to the inclosure, he cannot break the inclosure and enter, where he may enter by the open gate. But if the owner hinders him, so that he cannot go by the open gate for sear of death, he may break the inclosure and enter there, as then 6. 28. 2 Roll. Abr. 552.

Note, In all cases of misbehaviour by the sheriff, or other officers, in relation to replevins, they are subject to the ling's superior courts, and punishable by attachment for the misbehaviour.

build return to the then't that he cannot have view of the carrie, &c diffrained, to deliver them, the flieriff, by into the office, ought to et Aire into the troth the Hotzow

Of removing the Suit from the COUNTY COURT, &c. into the Courts of B.R. or C.B.

THE replevin remains before the Sheriff, &c. though the goods and chattels, &c. distrained are above the value of 40s. for the replevin, alias and pluries, are al vicontiel writs, 2 H. 7. 5. b. and the fuit may be deter. mined in fuch inferior court; but the fuit may be removed by either of the parties into the courts of B. R. o C. B. to be there determined.

And it may be removed by the plaintiff without cause

F. N. B. 69. m.

And by the defendant with cause, but not without cause F. N. B. 70. a. This, however, is otherwise now, for either party may remove it.

The method to be purfued in moving it, depends entirely on the manner in which the fuit was commenced below.

For if replevin be in the county-court by writ, it must be removed into B. R. or C. B. by pone. F. N. B. 69. m.

If in the county-court by plaint, it is removed by write recordari facias loquelam, [commonly called a refalo, for the fake of brevity.] F. N. B. 71. a.

If replevin is in a court of record, that may hold plea in replevin, it must be removed by writ of certiorari, and ca be removed in no other manner. 3 Mod. 56 .- Pa King ch. just. Hil. 3 Geo. 1. For a refalo does not go to a court of record, because there the suit is already re corded.

And if the plaint is in the court of another lord, it may be removed into B. R. or C. B. by recordari to the Sheriff commanding him quod aecedas ad curiam & in plena curia il

recordari facias, &c. F. N. B. 70. b.

But it is faid, that a replevin shall not be removed ou of a court, which is not the king's court, without cause neither by the plaintiff, nor by the defendant. Reg. 85. 2 Inflit. 339. for the prejudice that may come thereby to the lord.

All the above writs, to remove the fuit from the inferio courts into B. R. or C. B. are in their nature original write and iffue out of Chancery. But as the fuit is most usual commenced in the county-court by plaint, and feldom or eve at this day by writ, I shall only shew the method of re moving it when by plaint.

In order to remove it therefore, the party makes out precipe to the cursitor of the proper county, in the following form;

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plai the of removing the Suit from the COUNTYcourt, &c. into the Courts of B.R. or C.B.

Bucks, to wit, Refalo for [either the plaintiff or defendant naming him] of a plaint between C. D. and E. F. and G. H. for taking and unjustly detaining the cattle, goods, and chattels of the faid G.

Returnable from Easter in fifteen days.

Upon delivery of this writ to the cursitor, he makes out the writ, which must be carried to the under-sheriff of the county, who returns it of course.

The refalo is to the following effect:

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GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the Faith, &c. To the Sheriff of Buckinghamshire, greeting. We command you, that in your full county you cause the plaint to be recorded, which is in the fame county, without our writ, between C. D. and E. F. and G. H. of the cattle, goods, and chattels of the faid C. taken and unjustly detained, as it is faid; and that you have the faid record before us [or if in C. B. before our justices] at Westminster, from Easter day, in fifteen days, under your seal, and the feals of four law-knights of the fame county, of fuch as shall be present at the said record; and that you presix the fame day to the parties, that then they may be there ready to proceed in the faid plaint as shall be just, and have you there the names of the faid four knights, and this writ. Witness ourselves at Westminster, theday of -- in the twentieth year of our reign.

Let this writ be executed if the faid C. desires it, other-

The return thereof, is as follows:

 Of removing the Suit from the County. COURT, &c. into the Courts of B.R. or C.B.

and G. H. of the cattle, goods, and chattels of the faid C. taken and unjustly detained, as it is faid, which faid plaint appears in a certain schedule to this writ annexed; and I have the faid record before our faid lord the king for the justices of our said lord the king] at Westminster, on the day within written, under my feal, and the feals of four lawful knights of the fame county, who were prefent at the faid record; and I have prefixed the same day to the parties, that they may be then and there ready to proceed in the faid plaint, as shall be just,

The answer of A. B. Esq; Sheriff,

The schedule to be annexed to the writ and return,

At my full court held at Aylesbury, in the county of Buck, the \_\_\_\_ day of \_\_\_\_ in the twentieth year of the reign of our sovereign lord George the third, &c. before L. M. N. O. P. Q, and R. S. four lawful knights of the same county, (amongst other things) it is thus contained; C. D. complains against E. F. and G. H. of a plea of taking and unjustly detaining of his cattle, goods, and chattels, to wit, one mare and four colts of the faid C. and at my full court held at Aylesbury, in the county aforesaid day of \_\_\_\_ last, before S, T. J. M. N.U. and W. X. four lawful knights of the faid county, I caufed the faid plaint between the parties aforefaid to be recorded as the writ hereunto annexed requires. In testimony whereof, as well I the faid Sheriff, as the faid S. T. J. M. N. U. and W. X. who were present at the said record have caused our seals to be hereunto put, the day and year and place above-mentioned.

A. B. Efq; Sheriff.

If the Sheriff returns the recordari, tarde, the party that have an alias, &c. F. N. B. 70. b.

By the recordari nothing is removed but the plaint, ever though iffue fhould be joined below. F. N. B. 71. a.

And the plaint may be removed, though the plaintif

has discontinued there, Ibid.

When the plaint is removed into B. R. or C. B. the plaintiff must declare there de novo, otherwise the desendant may sue out a writ de retorno kabendo. F. N. B. 71, a.

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a. And And the plaint, when removed, is filed with the Filazer of the county in B, R, as it is also when removed into C,  $B^*$ .

If the plaintiff removes the plaint, he must file the refalo, &c. with the Filazer, and see if the defendant has appeared; and if he has not appeared, he must give him a rule to appear; and upon non-appearance thereto, the plaintiff must sue out a pone; and upon like non-appearance thereto, he may sue out a distringus ad infinitum, till he does appear—And then the plaintiff declares.

But if the defendant removes it, he must file the refalo and return thereto with the Filazer; and having entered an appearance, he must then give a rule for the plaintiff to declare; and for want of a declaration, when the rule is out, he may sign a non-pros for not declaring, and immediately sue out a writ pro retorno habendo.

The defendant's attorney, upon filing the refalo, which he ought to do on the return day, or at least on the appearance day of the return, ought to give the plaintiff's attorney notice thereof, and call upon him for a declaration. But if the defendant does not get it returned and filed within two terms, the plaintiff may have a certificate thereof from the Filazer, and thereupon the cursitor will make him out a writ of procedendo, which being obtained, he may proceed in his plaint in the court below.

But note: Upon removal of any other actions, except replevin, into C. B. the writ and proceedings are filed with the prothonotary there.

#### Of the Declaration in REPLEVIN.

THE declaration in replevin may be laid in the county where the cattle or goods were taken, or in the county into which they were driven after the taking. F. N. B.

69. I.

And the declaration ought to be not only of a taking in a ville or town, but also in quodam loco vocat'. But if the defendant would take advantage of this omission, he must demur to the declaration. Hob. 16. Bullithorp v. Turner, C. B. Tr. 16. 17 Geo. 2.

But if the defendant would take advantage of a variance in the place where the taking is laid, from that in which it really was, he must plead it in abatement. 6 Mod. 103.

For prisal in auter lieu must be pleaded in abatement, and cannot be pleaded in bar. Salk. 3. pl. 8. 2 Ld. Raym. 1016. Carth. 344. Show. 98. And because such plea concluded with a petit judicium, and a return which is in bar, it was held ill.

The declaration must mention the cattle or goods demanded with such certainty, that the Sheriff may make deliverance of them—and therefore, it should mention the forts or species, as sheep, cows, &c. Carth. 218.

If the cattle or goods are returned, the declaration should fay, wherefore he took, &c. and detained them against gages and

pledges, until, &c. I Saund. 347.

But if they are not returned, the declaration must be, wherefore he took, &c. and still detains against gages and pledges. Co. Ent. 610. b. Rast. Ent. 560.

So if only part are returned, it shall fay as to that, detained until, &c. and as to the residue, still detains. Co.

Ent. 611. b.

If the declaration is in the detinuit, and the plaintiff prevails, he shall have damages for the taking and costs.

If in the detinet, and he prevails, he shall recover the value of the cattle or goods distrained, and his damages

for the taking, and costs. F. N. B. 69. L.

If defendant pleads prisal in auter leiu, he must go on and make an avowry pro retorno: yet such avowry is only a suggestion to bring him within the stat. 21 Hen. 8. c. 19. for damages. Before that statute no damages were given, and without such a suggestion he is not within the statute, but that being only for a particular purpose is not traversable. Salk. 94.

But if he pleads property, he shall have a return without making an avowry: for on demurrer, the court of B.R.

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#### Of the Declaration in REPLEVIN.

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B. R.

resolved these points; 1st, That property may be pleaded either in bar or abatement; 2dly, That where a collateral matter is pleaded in abatement, the defendant shall not have a return without making an avowry: but where the plea in abatement is to the point of the action, as property is, the defendant shall have a return without avowry; for whether property be in desendant or a stranger, the desendant ought to have a return, because he had the possession which was illegally taken from him by the replevin, when the plaintist had no right. Butcher v. Porter. Salk. 94. pl. 3.

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How to proceed if the Plaintiff does not de. clare, &c.

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If the plaintiff declares, the defendant may plead in abate. ment, or in bar; or he may avow in his own right, make conusance in right of another, or justify.

If the parties go on to iffue or demurrer, the proceedings

and practice therein are the same as in other actions.

If the plaintiff has removed the cause, and does not declare or proceed therein; or if the desendant has removed it, and after having served the plaintiff with a rule to declare, and demanded a declaration, and the plaintiff does not declare and proceed therein, the desendant may sign a non-pros and judgment pro retorno habendo, and then sue out a \* writ pro retorno

babendo, which he may obtain of the Filazer.

But note, if plaintiff dies after declaration, and before avowry, defendant cannot have a retorno habendo, but may difterain again. 2 Wilf. 83. And the reason is, that by the declaration, the desendant is charged with an unjust caption and detention, and therefore must purge himself of such charge by an avowry, before he can be entitled to have a return: for a return is adjudged by the court on the justice of the original caption; consequently, the desendant must shew the justice of such caption, before he can have a return.

The form of the writ pro retorno habendo :

GEORGE the third, by the grace of God, &c. To the Sheriff of Bucks, greeting. Whereas E. F. was fummoned to appear in our court before us for before our justices] at Westminster, to answer C. D. in a plea, wherefore he took the cattle of the faid C. to wit, one mare and four colts, and unjustly detained the fame against fureties and pledges, as he fays; and the same C. afterwards in our faid court made default, whereupon it was then and there confidered, that the faid C. and his pledges of profecuting should be in mercy, and that the aforesaid E. should go thereupon without delay, and that he should have a return of the cattle aforesaid. Therefore we command you, that you cause to be returned the cattle aforesaid to the said E. without delay; and the same at the complaint of the aforefaid C. you do not deliver without our writ, which thall make express mention of the aforesaid judgment, and in

<sup>\*</sup> Note: If the diftress was made for rent, see a better method of proceeding, post.

#### How to proceed if the Plaintiff does not declare, &c.

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what manner you shall execute this our precept, you shall make manifest to us [or to our justices] at Westminster, on [a general return day, all the proceedings being by original] and have you there this writ.

Witness, &c. on, &c. in the twentieth year of our reign.

If, however, the plaintiff even after such judgment of non-pros signed, and this writ of retorno habendo sued out by the defendant, would wish to go on in his suit, he is at liberty so to do; and his application for that purpose, must be made to the filazer for a writ of second deliverance; which writ of second deliverance is in the nature of a supersedeas to the writ pro retorno habendo, if brought before it be executed.

At the common law, if the plaintiff in replevin had been nonsuited, either before or after verdict, the defendant who distrained had judgment for a return, but not irreplevisable: So that the plaintiff might have had as many replevins as he would, which was vexatious and mischievous. To remedy which, the statute Westm. 2. c. 2. restrains the plaintiff from having any more replevins after a nonsuit, but gives him a writ of second deliverance. 2 Instit. 340.

And if after such writ of second deliverance the plaintiff is non-prossed, or becomes nonsuited, or the plea be discontinued, or the writ abates, or he prevails not in his suit, the defendant then shall have judgment for a return irreplevisable. 2 Instit. 241.

The writ of fecond deliverance is to the following effect:

"GEORGE the third, &c. To the Sheriff of Bucks, greeting. We command you, if C. D. shall make you secure of prosecuting his complaint, and also of returning the cattle which to E. F. lately in our court, before our justices at Westminster, at a certain day now past, were adjudged by the default of him the said C. D. if a return thereof shall be adjudged; then the cattle to him the said C. D. without delay, you cause to be delivered, and put by sureties and safe pledges the aforesaid E. F. that he be before our justices at Westminster, [the return] to answer the said C. D. of the taking of the cattle aforesaid, and that you have there the names of the pledges, &c. and this writ. Witness Sir William de Grey, knight, at Westminster,

How to proceed if the Plaintiff does not declare, &c.

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If upon the return-day, or the appearance-day of the return-day of the writ of fecond deliverance, the plaintiff declares, the subsequent proceedings are the same as in other

cases throughout the cause.

If the plaintiff does not fue out a writ of second deliverance, and the Sheriff should return to the writ pro retorno habenao, that the cattle, &c. were eloined or removed to places unknown, by reason of which he could not return the same to the defendant, as by the faid writ he was commanded, then upon such return of elongata, the defendant shall have a capias in withernam, which is to the following effect, and which is also obtained of the filazer.

GEORGE the third, &c. To the Sheriff of Bucks, greeting: Whereas E. F. was summoned to appear in our court, before our justices at Westminster, to answer C. D. of a plea, wherefore he took the cattle of the faid C. and unjustly detained the same against surcties and pledges, as he fays; and the same C. afterwards, in our same court, made default in the fame plca; whereupon it was then and there considered, that the same C. and his pledges of profecution should be in mercy; and that the said E. should go thereupon without delay, and that he should have a return of the cattle aforesaid: whereupon, by our writ, we commanded you, that you caused to be returned the cattle aforesaid to the said E. without day, and the same at the complaint of the faid C. you should not deliver without our writ, which of the aforefaid judgment should make express mention, and in what manner you should have executed our faid precept you should make manifest to our justices at Westminster, on [the return-day of the retorno habendo] last past, on which day you returned to our faid justices at Westminster, that before the coming of the aforesaid writ the cattle aforefaid were eloined or conveyed away to places unknown to you by the faid C. to that the cattle aforefaid to the faid E. you could not cause to be returned as by the faid writ you was commanded: therefore, we command you, that of the cattle of him the faid (2 to the value of the cattle before taken in withernam, you take and deliver

#### How to proceed if the Plaintiff does not declare, &c.

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to him the said E. to be held by him until the said cattle, before taken, you can cause to be returned, and put by sure and safe pledges the aforesaid G. that he be before our justices at Westminster, on [the return-day] to answer as well to us of the contempt, as to the said E. of the damages and injuries to him in that behalf done; and in what manner this our precept you shall execute make appear to our justices at Westminster, at the aforesaid return; and that you have there the names of the pledges, and this writ. Witness, &c. on, &c. at, &c. in the twentieth year of our reign.

The writ of withernam is but mesne process. Ld. Raym. 614. Vide Comb. 201. 2 Salk. 582.

W. fued a replevin. H. removed it by recordari into the King's Bench; the plaintiff did not declare, and upon that a return was awarded to H. upon which the Sheriff returns averia elongata, and then a withernam was awarded and executed; afterwards the plaintiff came and prayed that he might be admitted to declare; and also prayed a deliverance of the cattle taken in withernam: and it was testified by the clerks, that upon the plaintiff's submission to a fine for not declaring, and that being imposed upon him by the judges, he shall have deliverance of the withernam: and a fine of 35. 4d. being accordingly imposed on the plaintiff, he then declared, and had deliverance. Noy 50. Webb and Hind; but said, that the course of B. R. is contrary to that of C. B.

If the Sheriff should return nulla bona vel catalla ad valorem, &c. to the writ of withernam, the defendant may sue out an alias capias in withernam, and after that a pluries.

How to proceed if the Defendant does not apapear, &c.

I F the plaintiff has removed the cause, and the desendant has not appeared upon the return, or at least upon the appearance-day of the return of the result ; the plaintiff should serve him with a rule to appear, and upon his non-appearance thereto sue out a pone, which is to this effect:

GEORGE the third, &c. To the Sheriff of Bucks, greeting: Put by fureties and fafe pledges, E. F. that he be before our justices at Westminster from [the return-day] to answer to C. D. of a plea, wherefore he took the cattle, goods, and chattels of the said C. and them unjustly detained against gages and pledges, as he saith, and to shew wherefore he hath not appeared in our court before our justices at Westminster, from [the return of the refalo] last past, as the day prefixed to him; and have you there the names of the pledges, and this writ. Witness Sir William De Grey, knight, at Westminster, the day of in the twentieth year of our reign.

If upon the return of the pone, the defendant does not appear, the plaintiff may fue out a distring as ad infinitum till he does appear; which distring as is to the same effect as other writs of distring as, to compel an appearance of the party in court.

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How the Plaintiff is to proceed if the Defendant has removed the Suit, and does not file the Refalo.

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If the defendant has taken out the recordari facias loquelam, and does not get it returned and filed within two terms, the plaintiff should apply to the filazer for a certificate that the same is not returned and filed; which certificate, when obtained, is a sufficient warrant for the cursitor to make out a writ of procedendo, which remands the cause to the county-court to be there determined. Which writ of procedendo is to this effect:

GEORGE the third, &c. To the sheriff of Bucks, greeting: Although we lately commanded you, that in your full court you caused the plaint to be recorded, which is in the same county, without our writ, between C. D. and E. F. of the cattle, goods and chattels of the faid C. taken and unjustly detained, as it was faid; and that you should have the said record before our justices at Westminfler, from [the return of the refalo] under your feal, and the feals of four lawful knights of the same county, of fuch as should be present at the said record, and that you prefixed the same day to the parties, that then they might be there ready to proceed in the faid plaint, as should be just; and that you should have there the names of the faid four knights, and that writ. Yet we being now moved with certain causes in our court, before our said justices, command you, that in the same plaint, against the faid E. F. at the fuit of the faid C. D. before you levied or affirmed, and now depending undetermined, you proceed at your next county-court to be holden in and for the same county, with what speed you can, in such manner, according to the law and custom of England, as you shall see proper. Our said writ in that behalf heretofore directed to the contrary in any wife notwithstanding. Witness, &c, on, &c. at, &c. in the twentieth year of our reign,

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How the Defendant may proceed in case the Distress was for Rent after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

IF the cause has been removed into the superior court by the plaintiff, and after the defendant has appeared he does not declare or proceed therein; or if the cause has been removed by the defendant, and a rule being served on the plaintiff, he does not declare or proceed therein; the defendant may fign a nonpros, enter up judgment pro retorno babendo; and if the original diftress was made for rent, he may proceed to execute a writ of inquiry of damages, which is the better way than taking out a writ pro retorno habendo; because that writ may be superseded by the plaintiff's suing out a writ of second deliverance, as was seen before. For by the flat. 17 Car. 2. c. 7. An act for the more speedy and effectual proceeding upon diffresses and avowries for rents, reciting, that "Foralmuch as the ordinary remedy for arrearages of rents, is by diffresses upon the lands chargeable therewith; and yet nevertheless, by reason of the intricate and dilatory proceedings upon replevins, that remedy is " become ineffectual:" It is enacted, " That whenfoever " any plaintiff in replevin shall be nonsuit before issue joined, in any fuit of replevin by plaint or writ lawful-" ly returned, removed or depending in any of the king's courts at Westminster, that the defendant making a fig. e gestion, in nature of an avowry or cognizance for such rent, to ascertain the court of the cause of distress, the court upon his prayer shall award a writ to the sheriff of " the county where the diffress was taken, to enquire by " the oaths of twelve good and lawful men of his bailiwick, " touching the fum in arrear at the time of fuch diffres " taken, and the value of the goods or cattle distrained: and thereupon notice of fifteen days shall be given to the e plaintiff, or his attorney, in court, of the fitting of fuch " inquiry: and thereupon the sheriff shall inquire of the " truth of the matters contained in fuch writ, by the oaths " of twelve good and lawful men of his county: and upon " the return of fuch inquisition, the defendant shall have " judgment to recover against the plaintiff the arrearages of " fuch rent, in case the goods or cattle distrained shall " amount unto that value: and in case they shall not " amount to that value, then fo much as the value of the " faid goods and cattle fo diffrained shall amount unto, ce together

How the Defendant may proceed in case the Distress was for Rent after the Cause removed, and the Plaintiff Nonpross'd or Nonsulted at the Trial.

"together with his full costs of suit: and shall have execution thereupon by fieri facias or elegit, or otherwise, as
the law shall require. And in case such plaintiff shall be
nonsuit after cognizance or avowry made, and issue
joined, or if the verdict shall be given against such
plaintiff, then the jurors that are impanelled, or returned to inquire of such issue, shall, at the prayer of
the defendant, inquire concerning the sum of the arrears,
and the value of the goods or cattle distrained: and thereupon the avowant, or he that makes cognizance, shall
have judgment for such arrearages, or so much thereof as
the goods or cattle distrained amount unto, together with
his full costs, and shall have excution for the same by
feri facias or elegit, or otherwise as the law shall require."

Sect. 3. gives the like remedy to the avowant, &c. upon

a judgment given for him upon demurrer.

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And fect. 4. enacts, "That in all cases aforesaid, where "the value of the cattle, distrained as aforesaid, shall not be found to be the full value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may, from time to time, distrain \* again for the residue of the said arrears."

It has been the custom ever since this statute, as it was before, in all cases when the plaintist is nonprossed, to enter judgment pro retorno habendo; but notwithstanding, the defendant may enter a suggestion according to this statute, and take out a writ of inquiry; and if the plaintist should take out a writ of second deliverance afterwards, it will be no surfed as to such writ of inquiry; although such writ of second deliverance would be a supersedeas to the writ de retorno babendo.

Rule to shew cause, why the inquisition on a writ of inquiry of damages, final judgment, and fi. fa. should not be set aside. Distress was for a rent-charge; and after refalor eturned and filed, and rule given to declare, judgment de

A fecond diffress might have been taken by common law in ich case.

How the Defendant may proceed in case the Distress was for RENT after the Cause removed, and the Plaintiff Nonpross'D or NONSUITED at the Trial.

retorn. habend. was figned for want of a declaration; and a writ of retorn. habend. issued 12 July, 1759, but was never executed. The 2d of October, plaintiff fued out a writ of fecond deliverance, given by Westm. 2. Defendant did not proceed on the writ of retorn. babend. but entered a fuggestion on record, according to the 17 Car. 2. and the 27 Off. gave notice of the execution of the writ of inquiry of damages, having then had no notice of the writ of fecond deliverance, though of that he had notice before the execution of the writ of inquiry. - On the plaintiff's part it was urged, that the fecond deliverance removes the judgment of retorn, habend, and opens the cause again: that if the retorn, habend. be not executed, the second deliverance superfedes it; if executed, it brings back the distress. That after the merits tried under the fecond deliverance, the distress will be irreplevisable. On the writ of retorn, babend, awarded, the writ of fecond deliverance is given the party to reinstate him. That the defendant cannot enter a suggestion, but whilst the judgment of retorn. habend. (which is a nonfuit) subsists. But the court thought otherwise, and held, that a writ of fecond deliverance (which is not taken away by II Geo. 2.) is no fuperfedeas to the writ of inquiry of damages. If de-Endant had proceeded on the writ de retorn; habend, the court would have stopped him; but he made his option to proceed under the flatute of Car. 2. which he had a right to do. This and the former flatute were intended to prevent delay, and give the party a better remedy.—The state 21 Hen. 8. c. 19. gives damages in compensation of trouble and expence. The 22 Hen. 8. c. 15. gives costs where a nonfinit. The old statutes mention the writ of second deliverance, the new do not; vide Carth. 253, Palm. 403. Latch. 72. Rule discharged. If this construction was not put upon the statute of Car. 2. it would be totally nugatory. Cooper v. Sherbrook. Paries, 426. 2 Will. 116 vot on of gnibroos . A bis on cale made and provided, prays a writ of

The entry of a luggestion in the nature of a cognizance, is in the rent of the rent swollow of the cattle, goods, and chattels atoresaid; and it is granted the cattle, goods, and chattels atoresaid; and it is granted

Bucks, to wit. E. F. was funmoned to answer C. D. in a plea, wherefore he took the cattle, goods, and chartels of

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How the Defendant may proceed in case the Distress was for Rent after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

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the faid C. and unjustly detained the same against gages and pledges, &c. and whereupon the faid E. offered himfelf in court here, in his own proper person, on the against the said C. in the plea aforesaid, and the faid C. came not, but made default. Therefore it is considered, that the said C. and his pledges for prosecuting be in mercy, and that the faid E. go thereof without day, and have a return of the faid cattle, goods, and chattels, &c. and thereupon the faid E. fays, that he the faid E. took the said cattle, goods, and chattels, of the said C. for the taking whereof he was fummoned to appear in the faid court of our faid lord the king of the bench at Westminster, to answer to the said C. as aforesaid, at the parish of O. in the faid county, in a certain place there called the stable; and that he took the same as bailiff of I. A. for that the faid C. at the time of the taking the faid cattle, goods, and chattels, and for the space of two years and three quarters of a year ended at and upon the day of and from thence until the time of the taking of the faid cattle, goods, and chattels, held and enjoyed the faid stable, with the appurtenances, amongst other things, as tenant thereof, to the faid I. A. at and under the yearly rent of twelve pounds, payable quarterly; and because the sum of thirty-three pounds, of the yearly rent aforefaid, for two years and three quarters of another year, ending at and upon the faid day of in the faid year of our Lord 1779, on that day, in that year, and at the time of taking the said cattle, goods, and chattels, were in arrear and unpaid, he the faid E. as bailiff of the faid I. took the faid cattle, goods, and chattels, for and in the name of a diffress for the said rent so due in arrear and owing from the faid C. to the faid I. as aforefaid. And the faid E. according to the form of the statute in such case made and provided, prays a writ of our lord the king to be directed to the Sheriff of Bucks, to enquire of the lum in arrear of the rent aforefaid, and of the value of the cattle, goods, and chattels aforefaid; and it is granted to him: wherefore the Sheriff is commanded, that, by the oath of twelve good and lawful men of his bailiwick, he diligently enquire how much rent was in arrear and VOL. II.

How the Defendant may proceed in case the Distress was for RENT after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

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due to the said I. at time of the taking of the cattle, goods, and chattels aforesaid; and how much the said cattle, goods, and chattels, so taken in the name of a distress as aforesaid, were worth, according to the true value thereof; and the inquisition which he shall thereupon take, let him make appear here on [the return day] under his seal and the seals of those by whose eath he shall take the said inquisition, &c.

Upon entering the above fuggestion on a roll, the defendant may then sue out his writ of enquiry, which is to the following effect:

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GEORGE the third, by the grace of God, &c. To the Sheriff of Bucks, greeting. Whereas E. F. was lately fummoned to appear in our court of the bench, before our justices at Westminster, to answer unto C. D. of a plea, wherefore he took the cattle, goods, and chattels of the " faid C. and unjustly detained the same against gages and pledges, until, &c. and the faid E. F. offered himself in court, before our justices at Westminster, in his own proper person, on the day of wed by against the said C. in the plea aforefaid: and the faid C. came not, but made default. Therefore it was confidered, that the faid E. and his pledges should be in mercy; and that the faid E. should go thereof without day, and have a return of the faid cattle, goods, and chattels. And thereupon it hat been suggested to us in our faid court, before our faid jutices at Westminster aforesaid, by the said B. that he the faid E. took the faid cattle, goods, and chattels of the faid C. for the taking whereof, he was fummoned to appear in our faid court of the bench, before our faid justices at Wellminster, to answer the faid C. D. as aforesaid, at the parish of O. in the faid county, in a certain place there called the Hable; and that he took the same as bailiff of J. A. fol that the faid C. for the space of two years, and three quarters of another year, ending at and upon the faid

day of in the year of our Lord 1779; and from thence, until and at the time of taking of the faid cattle goods, and chattels, held and enjoyed the faid stable, with

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How the Defendant may proceed in case the Distress was for RENT after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

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the appurtenances, amongst other things, as tenant thereof to the said J. at and under the yearly rent of twelve pounds, payable quarterly: and because the sum of thirtythree pounds of the yearly rent aforefaid, for two years, and three quarters of another year, ending at and upon the day of in the year of our Lord 1779, on that day in that year, and at the time of taking the faid cattle, goods, and chattels, were in arrear, and unpaid to the said J. he the said E. as bailiff of the said J. took the faid cattle, goods, and chattels, for and in the name of a diffress, for the said rent so due in arrear and owing from the said C. to the said J. as aforesaid. And the said E. according to the form of the statute in such case made and provided, prayed our writ to be directed to you, to enquire of the fum in arrear of the rent aforefaid, and of the value of the cattle, goods, and chattels aforesaid. Therefore we command you, that according to the form of the statute, in that case made and provided, you diligently enquire, by the oath of twelve good and lawful men of your county, how much of the yearly rent aforesaid, at the time of taking the faid cattle, goods, and chattels, were in arrear and unpaid; and how much the faid cattle, goods, and chattels, taken as aforefaid, were worth, according to the true value of the same. And the inquisition which you shall thereupon make you shall certify to our justices at Westminster on [the return] under your seal, and the seals of those by whose oath you shall take that inquisition; and have you there the names of those by whose oath you shall take that inquisition, and this writ. Witness Sir William De Grey, knight, at Westminster, the day of in the twentieth year of our reign. did state this

Upon this writ of enquiry the whole fact is to be proved and may be litigated. Cooper v. Sherbrook. E. 32 Geo. 2. C. B.

If A. distrains B. for rent, and B. replevies and gives the usual bond to profecute, then levies his plaint, and afterwards removes the same by refalo, and then does not declare; or if he declares and A. avows, and B. not putting in a plea

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How the Defendant may proceed in case the Distress was for Rent after the Cause removed, and the Plaintist NONPROSS'D or NONSULTED at the Trial.

in bar, the avowant have judgment by default, that B. shall be amerced, and avowant have a retorno bahendo.—A. in sach case may either sue out a writ of enquiry of damages, according to this statute 17 Car. 2. c. 7. or he may commence actions on the replevin bond [taken according to the 11 Geo. 2. c. 19. s. 23.] against the plaintiff and his bondsmen.

to recover his damages and coffs.

As the statute 17 Car. 2. c. 7. relates only to distresse for rent, and gives a writ of enquiry by default, &c. if the distress was for damage feasant, after judgment pro retorns babend, the desendant's remedy is by writ de retorns babend, and if an elongata is returned, he may have a withernam, &c. or if the Sheriff has taken sufficient pledges, he may have an action against the Sheriff for such insufficiency of the pledges; or if the Sheriff took a replevin bond, and assigns the same to the desendant, he may have an action on such bond against the bondsmen.

But note: In cases of damage feasant, &c. the Sherist is not obliged to take a replevin bond, nor can he compel the plaintist to find bondsmen and enter into a bond; [the stat. 11 G. 2. c. 19. s. 23. only relating to distresses for rens] but then the Sherist before he makes replevin may insist upon sufficient pledges pro retorno habendo in pursuance of Wostm. 2. c. 2. and then the defendant after clangula returned to the writ de retorno habendo, may have a scire facias against such pledges—or if the plaint was never removed from the court below after a non-pros signed, he may have a precept in the

nature of a feire facias. Vide 2 Will. 41.

By the same statute 17 Car. 2. c. 7. if the plaintist is ranspired after issue joined, or if verdict is given against him, the jury returned or impanelled, at the prayer of the defendant, shall enquire of the rent in arrear, and the value

of the goods, &c. distrained, &c.

But if in such case the jury impanelled omit to enquire of the value of the rent arrear, or of the cattle, the defendant cannot then have a writ of enquiry to supply that omission, because the statute confines it to the jury impanelled in the cause. I Lev. 255. Therefore, in such case, the defendant must take judgment de retorno habendo at commentaw. Tucket v. Stephens. P. 6 Geo. 1. C. B. Carth. 362.

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How the Defendant may proceed in case the Distress was for RENT after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

Defendant had avowed for a years rent and had a verdict, but no value was found by the jury; whereupon a writ of inquiry was moved for under the 17 Car. 2. to ascertain the rent in arrear, and the value of the cattle. Gould justice, doubted whether it could be granted to supply a defective verdict in case of rent; though after a verdict by default, it would certainly lie, and cited Stephens and Spiller. In answer to which, Andrews and Jones, M. 24 Geo. 2. B. R. was cited as in point. But Gould said, that from a note of Mr. Burnew, that appeared to be a judgment by default. However, no cause being shewn, the rule was made absolute. Freeman v. Lady Archer. Tr. 11 Geo. 3. C. B. 2 Blacks. Rep. 763.

Note: In writs of enquiry under this statute, the jury set their hands and seals to the verdict; and upon the trial of such writs, the judge of niss prius is only affistant to the Sherist, and has no judicial power. And if the parties come to any agreement at the trial, the way is to bring it to the judge to sign, and afterwards move to have it made a rule

of court. Caf. K. B. 519. 610.

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By the 21 Hen. 8. c. 19. s. it is enacted, "That every avowant, and every other person or persons that make any avowry, justification, or conuzance, as bailiff or servant to any person or persons in any replegiare or second deliverance, for rents, customs, services, or for damages feasant, or tent or rents upon any distress taken in any lands or tenements, if the same avowry, cognizance, or justification te sound for them, or the plaintists in the same be nonsuit, or otherwise barred, that then they shall recover their damages and costs against the said plaintists, as the same plaintists should have done or had, if they had recovered in the replegiare, or second deliverance sound against the defendants."

Neither this statute, nor the 43 Eliz. [if the defendant avows as overseer for a distress for a poor rate,] tie the inquisition up to the same jury as are returned or impanelled, as

the 17 Car. 2. c. 7. does. Salk. 95.

In replevin the defendant avowed, and the plaintiff being nonfuited, brought a writ of fecond deliverance, whereupon it was moved to flay the writ of enquiry of damages.

It per cur. This is a supersedeas to the retorno habendo, but

How the Defendant may proceed in case the Distress was for RENT after the Cause removed, and the Plaintiff NONPROSS'D or NONSUITED at the Trial.

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not to the writ of enquiry of damages; for these damages are not for the thing avowed for, but are given by the stat. 21 H. 8. c. 19. as a compensation for the expense and trouble the avowant has been at. Salk. 95. pl. 6. Palm. 403. Latch. 72.

If the plaintiff is nonsuited for want of delivering a declaration, if it was through any cause that would have entitled him to a writ of second deliverance, as sickness of the person employed, &c. the court will order the desendant to accept of a declaration on payment of costs; otherwise, the plaintiff would be remediless, the writ of second deliverance being taken away by the 17 Car. 2. in cases of rent. Vent. 64.

No fecond deliverance lies after a judgment on demurrer, or after a verdict, or confession of the avowry; but in all these cases, the judgment must be entered with a return irreplevisable. But upon a nonsuit either before or after evidence, where the distress was not for rent, a writ of second deliverance will lie, because there is no determination of the matter; and there a writ of second deliverance lies, to bring the matter in question: but in the case of a demurrer and verdict, the matter is determined by law; and in the case of a confession, it is determined by the confession of the party. 2 Lill, Reg. 457.

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# Of NONPROSSING, NONSULTING, DISCON-

THE plaintiff pleaded two matters in bar to an avowry, and on one of the pleas the fact was found for him, but the judge did not certify [according to 4 Anne, c. 16: f. 5.] that the plaintiff had probable cause to plead the other plea. The defendant moved for costs pursuant to that statute; and the question was, whether the proceedings were within that statute or not? the avowant in replevin being omitted in the words of the statute. Rule to shew cause why the plaintiff should not pay costs was enlarged. Barnes, 144.

The defendant made two avouries, and plaintiff obtained anorder for time to plead, pleading issuably, and taking notice of trial for the sitting after last term in Middlesen, and within time demurred to the sirs, and pleaded in bar to the latter; and upon that the defendant signed a nonpress for want of pleading issuably to both avowries, which the court held to be regular. But upon payment of costs, pleading issuably, and taking notice of trial within the same term, the nonpress was set aside. Barnes, 314.

After joinder in demurrer, plaintiff obtained a rule for the avowant to shew cause why he should not discontinue on payment of costs; it was objected for the avowant, that a discontinuance in replevin is very different from a nonpros; and that after a discontinuance, a writ de retorno habendo could not be awarded. The court, however, did not enter into that matter, as the parties entered into a rule by consent, to stay proceedings on payment of the rent arrear with costs. Barnes, 171.

In Replevin, both plaintiff and defendant may carry down the record to trial.

The defendant brought down the record, but the plaintiff did not appear at the affizes; upon which, the defendant's counsel insisted strongly on a verdict, which was complied with. But afterwards, upon application by the plaintist to set the verdict aside, the court after hearing the judge's report, ordered the postea to be amended, and a nonfuit to be returned, instead of a verdict for the desendant; and that he should pay the costs of the motion. Barnes, 458.

On motion for judgment as in ease of a nonsuit, a distinction was endeavoured to be made from common cases, because in replevin desendant might, in the first instance, have carried down the record to trial. Per cur. The act of parliament has made no distinction. Barnes, 317.—But the King's Bench hold, that the desendant in replevin ought never

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to have judgment as in case of a nonsuit, as he himself is an actor, and may carry the cause down. Sayer on Costs, 142.

And as both plaintiff and defendant are actors, and may carry the cause down, if desendant give notice, and do not go to trial, the court will give costs against him; and for the same reason, the desendant may not move for judgment of nonfait, unless the plaintiff have given notice of trial. Eggleton v Smart, Tr. 2 Geo. 3. Vide 1 Blacks, Rep. 375.

The plaintiff's goods dittrained were not replevied, but, by content of the attornies on both fides, remained in the distrainors hands; and without any writ of refals or appearance in the court above, the plaintiff declared, the defendants avowed, and after long special pleadings, and after trial of the issues at the affizes, and a verdict for the plaintiff, the avowants moved to set aside all the proceedings; and the rule for that purpose was made absolute. The court held the agreement to be void, a fraud upon the revenue and officers, and an abuse of the court and the bar; that they had no jurisdiction, and consequently could not give judgment. Barnes,

Replevin for taking cattle in a certain place talled the Brills, in a certain other place there called the Boggs, the defendant avowed the taking in the place, in which, &c. because H. was seized in see of the locus in quo, &c. The plaintiff demurred, because here are two places alledged, and the avowant has only answered to the locus in quo, &c. which is but one of the two places. Et per cur. it is a discontinuance, Week v

Speed. Salk. 94.

The stat. 11 Geo. 2. c. 19. s. 22. gives the defendant or defendants in Replevin making avowry, or cognizance upon distresses for rent, relief, heriot, or other service; in case the plaintist in the action shall become nonsuit, discontinue, or have

judgment against him, double costs.

But where defendant avowed the taking and detaining an ox, as a seizure, for heriot custom, (claiming no right to distrain) and plaintiff became nonsuit, and the prothonotary had allowed defendant double costs, taking the case to be within the stat. 11 Geo. 2. The court, on motion that the prothonotary might review his taxation, made the rule for that purpose absolute; holding, that the avowry not being for taking the ox as a distress, is out of the stat. For heriot service, cattle, &c. are distrainable; for heriot custom not. Lloyd v Winten. Barnes, 148, 2 Wilf. 28,

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Before I conclude this title it may not be improper to remark, that formerly if there was any irregularity in a diffrefs, the party making it, was deemed a trespasser ab initio, and liable to make fatisfaction to the party distrained; but now by 11 Geo. 2. c. 19. " a distress for rent shall not be deemed " unlawful for any irregularity in the disposition of it after-" wards, nor the party making it a trespasser ab initio; but the " party aggrieved may recover full satisfaction for the special "damage he shall have sustained thereby, and no more, in " an action of trespass, or on the case, unless tender of amends " have been before made." - And by 17 Geo. 2. c. 38. " where " any diffress is made for money justly due for the relief of "the poor, it shall not be deemed unlawful, nor the party making it, a trespasser, on account of any defect or want of "form in the warrant of appointment of fuch overfeers, or in the rate of affesiments, or in the warrant of distress "thereupon; nor shall the party be deemed a trespasser ab " mitio, on account of any irregularity which shall afterwards be done by him; but the party grieved may recover for the amends bave been before the beggs the defendant the defendant the defendant the beggs the defendant the defendant the beggs the beggs the defendant the beggs the be " special damage, unless tender of amends have been before the set on the which, &c.

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If there is judgment for the plaintiff upon a relicita verificatione, cognovit actionem, nil dicit, &c. or for want of a replication to his plea in bar to the avowry, or upon a demurrer, a writ of enquiry of damages shall be awarded. Com. Dig. 9 Vol. 202.

Or at the request of the plaintiff, by the assent of the defendant, the justices may assess the damages without a writ of enquiry.

But if there is judgment for the plaintiff in replevin, quod adduct definet by default after appearance, there shall be a special writ of enquiry for the value of the goods or cattle and damages. F. N. B. 60. l. Co. Ent. 611. a.

But where the taking was lawful, the damage shall be only for the detainer, as where goods are taken damage feasure, and detained after amends tendered. F. N. B. 69.

If there is a verdict for the plaintiff, the jury usually affels the damages. 2 Saund. 315.

Or the jury after verdict may be dismissed, and damages affessed by the justices, with the defendant's consent.

Or if the jury do not affels the damages, and the goods, &c. should be detained, the plaintiff may make a suggestion thereof upon the roll, whereupon a writ shall go to enquire of the value of the cattle, &c. and damages; upon which the plaintiff shall have judgment for both.

In Replevin, defendant avowed as overseer for the poor's rate, and had a verdict, but the jury did not assess any damages. He signed final judgment, and the prothonotary allowed him 42 l. 10s. costs, after which he moved for a writest enquiry, being intitled to recover treble damages by the stat. 43 of El. by reason of the wrongful vexation, with his costs also sustained. Whereupon a rule was made to shew cause. On shewing cause, it was objected for plaintiss. 1st, That the defendant having already signed final judgment, and had his costs taxed, had made his election, and now comes too late. 2dly, That the damages must be assessed by the same jury, as appears by the 19 sec. of that statute. But per cur. The same jury who tried the issue may assess the damages; but if they do not, we must do justice, and award a write enquiry to the Sheriss; and a write was awarded accordingly. Dewell v. Marshall. C. B. 2 Will. 442. Vide Carth. 362.

Dewell v. Marshall. C. B. 3 Wilf. 442. Vide Carth. 362.

The difference is this. Where the matter omitted to be inquired by the principal jury, is such as goes to the very point

# of the Judgment and Execution in Re-

point of the issue, and upon which, if its found by the jury, an attaint will lie against them by the party, if they have given a false verdict; there such matter cannot be supplied by a writ of inquiry, because thereby the plaintist may lose his action of attaint, which will not lie upon an inquest of

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But where the matter omitted to be inquired by the principal jury does not go to the point of the issue, or necessary consequence thereof, but are things merely collateral, as damages are in the above case, and the four usual inquiries on a quare impedit, such may be supplied by a subsequent writ of inquiry, without any damage to the party; because if the same had been inquired into by the principal jury, it would have been (as to these particulars) no more than an inquest of office, upon which an attaint will not lie.

If there is judgment for the defendant upon a demurrer or redict, or the plaintiff is nonsuited, the defendant shall have return irreplevisable; but if the nonsuit is before verdict, the judgment for a return is not irreplevisable. 14 H. 7. 6. b. 34 H. 6. 5. a.

If the distress was for rent, and plaintiff is nonprossed, or judgment is given against him upon demurrer, the defendant may have a writ of enquiry according to 17 Car. 2. c. 7. which vide ante. Or if verdict is given for the defendant, or the plaintiff is nonsuited after issue joined, &c. the jury impanelled or returned shall enquire what arrear, and of what value the distress is, &c. and after such inquisition he shall have a fi. fa. elegit, &c.

If the defendant, upon the judgment de retorno habendo, sue out a writ pro retorno habendo, and the Sheriff cannot find the tattle, he may have a capias in withernam, upon the return of dingata. 2 Leon. 174.

But if the defendant has judgment for a return irreplevisale, if the owner of the cattle or goods tenders all that is due on the judgment, and it is accepted, he shall have a writ of belivery for the goods. 2 Instit. 107.

So if he tenders the whole upon the judgment, which is accertained upon the avowry, and is refused, he shall have definue. 2 Instit. 107.

In avowry for damage feafant, defendant had a verdict, and all didged that he shall have a retorn. habend. for the cattle, and a ca. fa. for the damages; but if the party tender the costs

# Of the Judgment and Execution in Re-

and damages, the Sheriff, after such tender, ought not to exe-

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But if for want of such tender the Sheriff doth execute the retorn, babend, and afterwards the costs and damages are paid, a writ si constare poterit lies upon suggesting, that the costs, &c. are paid, and this is to redeliver the distress, and is called a writ of restitution. Cro. Car. 162.

3 Solk. 54.

hat such inserior court hath all smed a greater of other power than was entrussed to it by law, or that it has re-shed to allow of acts of parliament, or hath expounded them contrary to their true and proper exposition and furent for the true and true are true and true and true are true and true and true are true are true and true are true are true are true and true are true are true and true are true and true are tru

If interior courts exceed their jurisdiction, the officer who excutes the featence, and in tome cases the judges that go it, are in fach superior courts punishable, tometimes at the suit of the king, sometimes at the suit of both, according to the variety of the case. Dawe, 72.

The will of problibition is to preferre the right of the sing's crown and courts, and is intended for the ease and quet of the subject; so that it is the wildom and policy of the law to suppose both best prescreed when every thing was in its right channel, according to the original jurit slam of every court. Shows Par Cuf. 63.

So that probablisms do not import that the integral of the inferior remporal court are also than the king courts; the fignify that the cause is drawn of disidenamen than it ught to be and therefore it is always said in all probibations to the court ecclesiaftical or temporal to which it is awarded hat the cause is drawn at also examen contra coronam etapitatem regions a losse for Rol Ref. 252 3 Ball. 20. Palm agr.

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udgment S all external jurisdiction, whether ecclesiaftical or civil, A is derived from the crown, and the administration of julice is committed to a great variety of courts, hence it hath been the care of the crown, that these courts keep within the limits and bounds of the jurisdiction prescribed them by the laws and statutes of the realm; and for this purpose a writ of prohibition was framed to early as the 2 Ed. 1. which writ iffues out of the superior common law courts, to restrain Il inferior courts, whether ecclesiastical or temporal, maritimes military, &c. upon a suggestion made in the superior court, that such inferior court hath assumed a greater or other power than was entrusted to it by law, or that it hath refuled to allow of acts of parliament, or hath expounded them contrary to their true and proper exposition and intent, &c. &c.

If inferior courts exceed their jurisdiction, the officer who executes the fentence, and in some cases the judges that give it, are in fuch superior courts punishable, sometimes at the fuit of the king, sometimes at the fuit of the party, lometimes at the fuit of both, according to the variety of

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The writ of prohibition is to preserve the right of the ling's crown and courts, and is intended for the ease and quiet of the subject; so that it is the wisdom and policy of the law to suppose both best preserved when every thing runs in its right channel, according to the original jurif-

diction of every court. Show. Par. Caf. 63.

So that probibitions do not import that the ecclefiaftical or other inferior temporal court are alia than the king's courts; but fignify that the cause is drawn ad aliud examen than it wight to be: and therefore it is always faid in all probibitions be the court ecclefiaftical or temporal to which it is awarded) be the hat the lignitude that the cause is drawn ad aliud examen contra coronam et lignitatem regiam. 2 Instit. 602. Rol. Rep. 252. 3 Bulf. 120. Palm. 297.

#### From whence it iffues.

THE superior courts at Westminster, having a superintendency over all inserior courts, may, in all cases of innovation, &c. award a prohibition: in this the power of the King's Bench has never been doubted. F. N. B. 53. 4 Inst. 71.

which may iffue as well in vacation as in term time; but such writ is returnable into B. R. or C. B. Bro. Prob. pl. 6.

. Inft. 81. Will. Rep. 43.

As the common law courts are not always open, if one is fued in an inferior court for a matter out of the jurifdiction, the defendant, if it happen in vacation time, when only the Chancery is open, may move that court for a prohibition: but then it must appear by oath made, that the lact did arise out of the jurisdiction, and that the defendant tendered a foreign plea, which was resused; and if a prohibition has been granted out of Chancery improvide, or with out these circumstances attending it, the court will gran

a supersedeas thereto. Will. Rep. 476. pl. 135.

As the jurisdiction of the court of Common Pleas is founded on original writs out of Chancery, it was formerly doubted whether it could, without count or plea depending therein award a prohibition: but it has been determined by the unanimous sense of all the judges, that this court may, upor a suggestion, grant prohibitions, to keep as well tempora as ecclesiastical courts within their bounds and jurisdictions and that without any original writ or plea depending: the common law being in these cases a prohibition of itself, and standing instead of an original. Bro. Prob. pl. 6. Noy 153 12 Co. 58. 108. Bro. Gon. pl. 3. 4 Instit. 99. 2 Brownl. 17 Vaughan 157.

The grand fessions in Wales may also send a prohibition and write to the spiritual courts there, as well as the court here may. Sid. 92. Sed vide Cro. Car. 341. Jones, 330

Vau. 411.

In B. R. and C. B. this difference hath been made, the in B. R. a prohibition may be awarded upon a bare furmit without any fuggestion on record; but that for a prohibition out of C. B. there must be a suggestion on record, at therefore the latter is considered as the suit of the past and in which he may be nonsuited, and is not discontinuate by the demise of the king; but the former is only in natural of a commission prohibitory, which is discontinued by the demise of the king. Noy 77. Palm. 422. Latch. II.

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But if an attachment issues upon such prohibition, or the party puts in bail, then it becomes a private suit, not discontinued by the demise of the king; and after such proceeding the party may be nonsuit, but not before. Palm. 423. Latch. 114.

But per Holt, ch. just. B. R. a prohibition cannot be moved for, if it be intisted, till the suggestion be entered on second. Salk. 136.

So for want of a suggestion on record, the court of B. R. discharged the rule to shew cause why a prohibition should not be awarded. Hawkins, assignee of Wooldridge, a bankrupt, gainst Blaquire and others, assignees of Sampson, Hil. 20

It hath been said, that the granting a prohibition is extended in the second in the second in the second in the second in the circumstances of the case, the superior courts are a liberty to exercise a legal discretion herein, but not an arbitrary one in resusing prohibitions, where in such like cases they have been granted; or, where by the laws and sautes of the realm they ought to be granted. Salk. 33.

It hath been determined in the house of lords, that no writ of error will lie upon the refusal of a prohibition; but when a consultation is awarded it is with an idea consultantum est, and then a writ of error will lie, because there is a judgment.

Id. Raym. 545. Salk. 136.

No prohibition can be had, unless the party is in danger by some suit actually depending; and therefore a prohibition cannot be granted before a libel, or appearance to a suit know. Salk. 35. pl. 8. March. 24, 25. For a prohibition was timet does not lie. Allen, 56.

It is clearly agreed, that in all cases where is appears pon the face of the libel, that the admiralty or spiritual court, &c. have not a jurisdiction, a prohibition may be warded, and is grantable as well after as before santence; to the superior courts are to take care that the inserior courts keep within their due bounds. 2 Inst. 602. 2 Roll. fr. 318. Noy 137. Sid. 65. Cro. El. 571. Maor 462. 67. Carth. 463. Skin. 299. pl. 2. But after sentence a conhibition shall not go, unless the want of jurisdiction in the court below appears upon the face of the proceedings.

# Of the Suggestion for a Profitsition.

WHERE the court has a natural jurisdiction of the thing, but is restrained by some statute, as by 23 H. 8. for not citing out of the diocese, there the party must come before sentence; for after pleading and admitting the jurisdiction of the court below, it would be hard and inconvenient to grant a prohibition. Vide the authorities antea, and Gro. Car. 97: 2 Show. 145. pl. 153: 155. &c. 2 Salk. 543.

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When a prohibition is moved for, the method is for the party to file a fuggestion in court, stating the proceedings that have been had in the court below, and then suggesting the reason why he prays the prohibition; and upon this the court grants a rule to shew cause why a prohibition should not iffue; and if upon shewing cause it appears to the court that the surmise is not true, or not clearly sufficient to ground the prohibition upon, they will deny it; otherwise they will make the rule absolute for a prohibition; or if the matter be doubtful, they will order the party to declare. Hob. 67.

The court will not grant a prohibition the last day of term, but on motion a rule may be obtained to stay proceedings till the ensuing term. Latch. 7. 2 Rol. Rep. 456.

The fuggestion for a prohibition is to the following effect:

The form of a suggestion for a prohibition to the bailiff of a borough, to prohibit him from holding plea in a matter arising extra jurisdictionem.

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Great Britain. Be it remembered, that on ----- next after fifteen days of Saint Martin, in this same term, before the lord the king at Westminster, comes A. B. in his proper person, and giveth the court of our lord the king here to understand, that whereas by a certain act of parliament, made at a parliament holden at Wellminster the twenty-fifth day of April, in the third year of the reign of the late king Edward the first, it was (amongst other things) ordained and established by the authority of the fame parliament, " Of great men and their bailiff's, and other (the king's officers only excepted unto whom especial authority is given) which at the complaint of fome, or by their own authority, attack others passing through their jurisdiction with their goods, compelling them to answer afore them upon contracts, covenants and trespasses, done out of their power and their

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their jurisdictions, where indeed they hold nothing of them, nor within the franchise, where their power is, in prejudice of the king and his crown, and to the damage of the people : it is provided, that none from thenceforth to do; and if any do, he shall pay to him, that by this occasion shall be attached, his damage double, and shall be grievously amerced to the king" as by the faid flatute (amongst other things it more fully appears) nevertheless, one C. D. not ignorant of the premisses, but contriving and intending the faid A. against the form of the statute, unjuffly to vex, oppress and weary, and to draw him into les in the court of our lord the king, of record, of the borough of Bridgnorth, in the county of Salop, held in the faid borough, before the bailiff of the faid borough, in a certain action which had arisen and accrued out of the jurisdiction of that court; and also the common law of the realm (to every subject of right due) to derogate; from and abridge, and the due course of law to subvert. and the issues and profits which to the said lord the present king thereof might happen, and which to his royal crown especially belongeth to diminish, in the said court of our faid lord the present king, of record there, held on in the nineteenth year of the reign of the lord the present king, before the bailiffs of the faid borough, according to the custom of the said borough, from time whereof the memory of man is not to the contrary used and approved, levied his certain plaint against the said A. in a certain plea of trespass upon the case, to the damage of the faid C. D. of fifty pounds: and the faid C. D. by pretence of the plaint aforefaid, in form aforefaid, levied and affirmed, then and there caused and procured him the hid A. paffing within the jurisdiction of that court, to be stached and arrested, and compelled the said A. to appear in the faid court, and the faid A. of and upon the premittes injustly constrained to answer. And thereupon in the fine court, held on the lo yall day of news and in the meteenth year of the reign aforefaid, before the faid balliffs of the faid borough, the faid C. D. upon his Morefaid plaint did declare against the said A. in manner form following; that is to fay, C. D. complains gainst A. B. (here insert the declaration) &c. which said aint now remains in the faid court depending and undetermined, and there in the faid court is profecuted by the faid Course Whereas in truth and in fact, the aforebish consens and trespaties, dine out of theill poroval

aforesaid cause of action in the said plaint and declaration mentioned, arose and accrued to the said C. D. out of the faid borough of Bridgnorth, and out of the jurisdiction of that court; that is to fay, at the parish of the faid county of Salop, and not within the faid borough of Bridgnorth, or within the jurisdiction of that court, And whereas the faid A. holds nothing of them the faid bailiffs, or within the franchise or jurisdiction of that court, And, whereas in fact, the bailiffs of the faid borough, or any of them, never had or hath power to hold the plea aforesaid, nor to hear and determine the said plea as aforefaid, arifing and accruing out of the jurisdiction of the faid court, by the laws of this realm, nor by virtue of any letters-patent of the faid lord the prefent king, nor of any of his progenitors or predeceffors, kings or queens of this realm; nor by any title of prescription, from time whereof the memory of man is not to the contrary used and approved, or any otherwise howsoever; " And elthough the faid A. all and fingular the matters and things by him above fuggested, bath pleaded in his discharge in the aforesaid court \* before the aforesaid bailiff of the said faid borough, and there offered to verify and prove the fame by undeniable testimony and proof; nevertheless, the bailiffs of the borough aforefaid, the aforefaid plea and allegation of the faid A. there to receive or admit altogether refused, and threatened to give judgment in the faid court, in the faid action, against the faid A. in contempt of our lord the prefent king, and to the great damage of the faid A. and contrary to the law of this realm, and also against the form of the statute aforesaid; and this the faid A. is ready to verify: whereupon the faid A. humbly imploring the aid and munificence of the court of our lord the prefent king, prays speedy remedy, and a will of our lord the prefent king of prohibition to be directed to the faid bailiffs of the faid borough, and other compe-

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Note, Where there is no defectus jurisdictiones, but only triationis, the defendant must plead it below, and have his plead disallowed, before he can be entitled to a prohibition. But where there is a defectus jurisdictionis, the party has no occasion to plead it below, before motion for prohibition.—Therefore in the above precedent given of a suggestion, there was no occasion for that part of it.

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tent judges in that behalf; and also to the said C. his counsellors, attornies, and folicitors in this behalf whomfoever, to prohibit them and of every them, that they, or any of them, in the faid plea of trespass, in any manner touching the fame in the faid court, before the faid bailiffs of the faid borough, or any of them, to proceed, should not presume, nor any further in that behalf hould attempt, which to the further derogation of the crown of his prefent majesty, or to the contempt of the law, or the loss or prejudice of the faid A. might in any wife turn, on pain of incurring the punishment due to violators of the law of this realm; but from all further profecution against the said A. in the said court, before the bailiffs of the faid borough, or any of them, should utterly defift, and each and every of them should defift; and it is granted to him, &c.

The form of a suggestion for a prohibition to an ecclesialical court on a libel there by a vicar against a parishioner for subtraction of tithes, setting forth that there is a modus in the said parish, &c.

England. Be it remembered, that on after days from the day of Easter, in this same term, before our lord the king, at Westminster, comes A. B. by his attorney, and gives the court here to understand and be informed, that whereas all and all manner of pleas, of and concerning any prescriptions and customs whatfoever, within this realm, and the cognizance of fuch pleas belong and appertain to the faid lord the king, and his royal crown, and to the common law, and in the courts of our faid lord the king, of record, ought and have always been accustomed to be tried and discusled, and not in any ecclesiastical court. And whereas on the 1st day of January, 1779, the faid A. B. was, and from thence hitherto hath been, and still is, seized in his demesne as of see, of and in divers, to wit thirty, acres of meadow, situate, lying and being, within the parish of in the county of ——— and within the bounds, limits, and titheable places thereof; and, during the time aforefaid, was possessed of divers cows and calves, within the faid parish, and the bounds, limits, and titheable places thereof. And whereas within the faid parish there are, and from time whereof the memory of man is

not to the contrary have been, certain customs and modes of tithing, that is to say, one certain custom, &c. [inserting the customs and modusses, &c.] nevertheless, one C. D. clerk, vicar of the parish of —— aforesaid, not ignorant of the premisses, but contriving unduly to aggrieve and oppress the faid A. B. against the due course of the law of this realm, and to draw the cognizance of a plea which belongs to our lord the king's temporal courts, and ought there to be tried, discussed, and determined to another trial, on the day of 1779, drew the faid A. B. into a plea and caused him to appear in the court christian, before the right worshipful 7. C. master of 27ts. vicar general, and principal of the epifcopal or confiftonal court of \_\_\_\_ lawfully conflituted his furrogate, or fone other competent judge in that behalf, by craftily and fub. tilly libelling against the said A. in the said court christian -First, that in the year, &c. [ state the libel] and although the faid A. hath alledged and pleaded all and fingular the matters above suggested and alledged in the said court christian, in his discharge of and from the tithes, & and offered to prove the same by indisputable evidence: yet the aforefaid spiritual judges have altogether refused and still do refuse, to admit or receive the same plea, allegation, or proof, and endeavour with all their might to compel the faid A. to pay the faid monies in the aforefaid libel specified, and daily threaten to condemn the said A of and upon the premisses, in contempt of our faid lord the king and his laws, to the great damage and injury of the faid A. and against the course of the law of this realm, and the customs and prescriptions aforesaid; all which said premisses the faid A. is ready to verify and prove, as the court of our lord the king here shall direct: wherefore the faid A. imploring the aid and affiftance of this court here prays relief, and his majesty's writ of prohibition to be directed to the faid official principal of the episcopal confiftorial court of ——— aforefaid, his furrogate, or other competent judge in this behalf, to prohibit them and ever of them, that neither they nor any of them do any furthe hold pleas in the faid spiritual court, before them or an of them, touching the premisses aforesaid, or any par thereof, &c.

For other forms, respecting other matters, see the books of entries.

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From various books and reports, the force, effect, and vadity of agreements for tythes, whether fuch agreements are by indenture or parel, appears to be a very unfettled point. And it is faid to be the constant practice of the courts at Vehminster, not to grant prohibitions upon the suggestions of ach agreements, but to leave it to the spiritual court to dearmine: and if the party thinks himself there aggrieved, he may appeal. And this feems to hold still, as to such parol ales under the term of three years; for if they be above bree years, then by the flat. of frauds and perjuries, they are made to have the force only of leafes at will; and if under biree years, yet by that statute there must be yearly reserved mo thirds, at least, of the full improved value of the thing emised. Comp. Incumb. 339, 340. Vide Bac. Abr. 3. 14.336, Es. had the rear, Co fitte the liber that in the

the laid A hath alledged and pleaded all and fingular in matters above juggestied and alkedged in the kild com christian, in his discharge of and from the tithes, & and offered to prove the fame by indiffurable evidence ver the storefaid fairitual judges have altograther refuted and Hill do refuse, to admit or receive the same plea, alle garion, or proof, and endeavour with all their might b compel the faid M. to pay the faid monies in the aforeign The frecified, and daily threaten to condomn the faid. of and upon the premifies, in contempt of our faid lori to king and his laws, to the great damage and miury of the frid A. and against the course of the law of this realm, an the curloms and preferiptions aforefald grait which is premittee the faid A. is ready to verify and prove, as to court of our lord the king here thall direct a soheretare the faid A. imploring the aid and affiftance of this court her prays' relief, and his majeffy's writ of prohibition to be directed to the faid official principal of the spateopal can fifteerial court of \_\_\_\_\_ aforefaid, his furrogate, or other competent judge in this behalf, to prohibit them and even of them, that neither they nor any of them do any further shold pleas in the faid ipiritual court, before them or an in the residence them, touching the pramisses aforeful, or any put may A Shold pleas in the faid spiritual court, before them or an

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every urthe Of proving the SUGGESTION, in What Cafes necessary, and at what Time.

IF the fuggestion for a prohibition is to stop a suit commenced in the ecclefiaffical court for subtraction of tythes or other ecclesiastical dues, the 14 fect. of the 2 & 3 Edw. 6. c. 12. requires, "That if any party do fue for any prohibition " in any of the king's courts, that then the fame party, before any prohibition shall be granted to him or them, " shall bring and deliver to the hands of some of the just. " tices or judges of the same court where such party demand. es eth the prohibition, the very true copy of the libel de-" pending in the ecclefiaftical court, concerning the matter "whereupon the party demandeth the prohibition, fub-" scribed or marked with the hand of the same party; and " under the copy of the faid libel shall be written the sug-" gestion, wherefore the party so demandeth the said pro-" hibition: And in case the said suggestion, by two bought and sufficient witnesses at the least, be not proved true in " the court where the prohibition shall be so granted, within fix months next following after the faid prohibition " shall be so granted and awarded, that then the party that is " letted or hindered of his or their fuit in the ecclefiafti-" cal court by such prohibition, shall, upon his or their " request and fuit without delay, have a consultation grant-" ed in the same case in the court where the said prohi-" bition was granted; and shall also recover double costs and " damages against the party that so pursued the said prohi-" bition, &c."

As this statute refers to the statutes 27 & 32 H. 8. which extends to tythes and offerings generally, all fuch tythes and church duties as are mentioned in those statutes are as much within this act as if enumerated. 2 Inflit. 662.

Comp. Incumb. 600. Dyer, 170. b. And therefore it extends to prohibitions to fuits for small tythes as well as great. Yelv. 102. Ld. Ray. 1172.

So a fuggestion of a modus decimandi ought to be proved within fix months, being within this act. Noy, 148. Tout

So where the party suggested, that he was to pay so much upon an arbitrament, being the same as a modus decimandi. Roll. Rep. 55.

But there needs no proof of the fuggestion where the fuit is for tythes contrary to common right, or where the contract of the party is suggested. Yelv. 104. 119. 2 Leon. 29. Hetl. 145. 2 Keb. 134. Lit. Rep. 297.

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The suggestion need not be proved strictly,—proof by hear-lay is sufficient. Palm. 397.—or that it is so by common fame. Noy, 28. Nor with precise certainty as to all is circumstances; but that if it be proved in substance, or in such a manner as to shew that the ecclesiastical court hath not jurisdiction, it is sufficient.

And the fuggestion may be proved by persons, although such persons at the trial may not be able and competent witnesses. Mich. 27 Car. 2. C. B. Sharp v. Hobarts.

If a suggestion consists of two parts, one witness to one part, and another to the other part, is sufficient. Vent. 107.

If the party is ordered to declare in Probibition, the proof

If the party is ordered to declare in *Probibition*, the proof of the fuggestion need not be within fix months, because the proof in such case is to be made at the trial of the cause, Cas. in C. B. 158.

And note: The fix months is according to the calendar, and not lunar months, for this is a computation which concerns the church. Hob. 179. 2 Mod. 58. Lit. Rep. 19. And the fix months commence from the teste of the writ of prohibition, not from the time of the rule for awarding it. 2 Ld. Ray. 1172. 2 Salk. 554. pl. 20. 656. pl. 2.

And if the furmise be proved before one of the judges within the six months, it is sufficient, although it is not recorded till after the six months by the court. Noy, 30. But it must be entered in the office. 2 Show. 308.

And proof which is not sufficient, may be supplied with better within the six months. Lit. Rep. 155.

The plaintiff had obtained a rule to shew cause why a consultation should not go, for want of the plaintiff's proving his suggestion within the six months, and why the plaintiff should not pay double costs. Upon cause shewn it appeared, that the declaration had been, by rule, ordered to be made agreeable to the proceedings in the spiritual court, and thereupon a prohibition to issue. And the court being of opinion, that the time for proving the suggestion ought to be computed from the time of the amendment, and not farther back, the six months were not expired. So the rule

was discharged. Barnes, 428.

A writ of prohibition had been granted on motion, and plaintiss not having proved their suggestion according to the statute 2 & 3 Ed. 6. to be true within fix months.—It was moved, that a writ of consultation might be awarded for defendant, plaintiss not proving their suggestion to be true within

Of proving the Suggestion, in what Cafes necessary, and at what Time. JHY

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within the limited time; and that plaintiffs might according to the direction of the flatute, pay defendant double cofts. It was doubted, whether plaintiffs, being administrators, ought to pay costs. But the court seemed to think, that desendant was intitled of course to a writ of consultation. Sed Cur advis'. as to both points. Barnes, 130, mid of homen

AFTERWARDS, that is to fav. on the in the twentieth year of the reign of our fuvereign lord George the third, of Great Britain, France, and Irsland, king, defender of the faith, Son at in the country of ... before [the judge] comes, the sid A. B. in his proper person, and to verify, active, and prove his fuggettion aforeisid, and all and every marter and thing bontained in the fame inegention on the part of the laid of B, to be proved, produceth three good lawful and sufficient witherless, to wit, O. P. of the forms ty atoretud, nufbandman, and agod about twenty-four years, or thereabouts; Q. R. of the same place, labourer, aged fixty years or thereabouts; and S, T. of the parish , in the faid county, farmer, aged forty years and upwards, before the find juffice at aforefaid, according to the form of the flatute in fuch case made and provided. which faid witnesses so as aforefaid produced by the faid A. is, being then and there fworm upon the holy Enangelists, to depote the truth of and upon the premiffes specified in the storefaid suggestion, say and depose, and each of them leverally upon his outh faith, and depoteth in manner and form following: that is to lay, the faid O. p. for himfelt, upon his outh faith and depofeth, that, &c. [Here enter the proof of what he (wears, ] And the faid & R. for himself upon his faid outh thith and deposeth. that, el. (Finter what he is ears to.) And the faid O.P. and Q. R. for inemfelves feverally upon their faid outh lay, and depoke, that, &c. [Enter what they both fweater in. And the faid & T. for himfelt, upon his faid bath. laith and depoteth, that We The part he friends to de Which faid depolitions taken before the laid the mone of the judge] in form aforelaid, the faid juffice afreywards, to wit, in Alachaelmas term, in the nineteenth wear of the 10 eign of our faid ford the now king, delivered by his own proper hands, into the court of our faid ford the king of the Rench, here to be enrolled of record, at a course worn the day of ay of ay of the state of the track

# Of entering the Proof of the Suggestion.

WHEN the party has proved his suggestion before a judge, according to the 14th seet. of the 2 & 3 of Edw. 6. c. 13. an entry of such proof must be drawn out in order to be entered of record in court, which is to be done in the sollowing manner, after the suggestion and the award of the writ of prohibition.

And the writ of the prohibition of the lord the king

is granted to him, &c."

Of

AFTERWARDS, that is to fay, on the day of in the twentieth year of the reign of our fovereign lord George the third, of Great Britain, France, and Ireland, king, defender of the faith, &c. at

in the county of before [the judge] comes, the faid A. B. in his proper person, and to verify, testify, and prove his fuggestion aforesaid, and all and every matter and thing contained in the same suggestion on the part of the faid A. B. to be proved, produceth three good lawful and fufficient witnesses, to wit, O. P. of in the county aforesaid, husbandman, and aged about twenty-four years, or thereabouts; 2. R. of the same place, labourer, aged fixty years or thereabouts; and S. T. of the parish in the faid county, farmer, aged forty years and upwards, before the faid justice at aforefaid, according to the form of the statute in such case made and provided: which faid witnesses so as aforesaid produced by the faid A. B. being then and there sworn upon the holy Evangelists, to depose the truth of and upon the premisses specified in the aforesaid suggestion, say and depose, and each of them feverally upon his oath faith, and deposeth in manner and form following, that is to fay, the faid O. P. for himself, upon his oath saith and deposeth, that, &c. [Here enter the proof of what he swears.] And the said R. for himself upon his said oath saith and deposeth, that, &c. [Enter what he swears to.] And the said O. P. and Q. R. for themselves severally upon their said oath fay, and depose, that, &c. [Enter what they both swear to.] And the faid S. T. for himself, upon his said oath, faith and deposeth, that, &c. [The part he swears to.] Which faid depositions taken before the faid [the name of the judge] in form aforesaid, the said justice afterwards, to wit, in Michaelmas term, in the nineteenth year of the reign of our faid lord the now king, delivered by his own proper hands, into the court of our faid lord the king of the Bench, here to be enrolled of record.

Sworn the in the year of our Lord, 1780. By me

# Where the Suggestion must be verified by an Affidavit.

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IN some cases the courts require an offidavit to be made on application for a probibition, to support the suggestion.

Per Holt ch. just. B. R. in Godfrey v. Llewellin, 11 W. 3, the bishop of St. David's case. Where the matter suggested for a prohibition appears upon the face of the libel, we never insust upon an affidavit; but unless it appear upon the face of the libel, or if you move for a prohibition as to more than appears upon the face of the libel, to be out of their jurisdiction, you ought to have an affidavit of the truth of your suggestion. Salk. 549. pl. 3.

Upon motion for a prohibition, there must be an affidavit

Upon motion for a prohibition, there must be an affidavit that the matter suggested to have been pleaded was pleaded below in the spiritual court, and disallowed, vide Ld. Raym, 1211. for otherwise, any one might come and suggest a falle fact, and so oust the spiritual court of their jurisdiction.

In Hynes v. Thompson, [mentioned by Aston Just, in Bug. gin v. Bennet. Burr. 4 pt. 2039, 2040.] Lord ch. just. Lu laid down the rule to be, "That if you move for a prohibition upon any thing not appearing upon the face of the proceedings, you ought to have an affidavit of the truth of the suggestion." And he cited Godfrey and Llewellin, 2 Salk, 549. in point; and 2 Salk. 551. pl. 13. where Holt ch. just, fuggestion." laid down the law to be, "That wherever the matter, which you fuggest for a prohibition is foreign to the libel, you must plead it below, before you can have a prohibition; otherwife, where the cause of prohibition appears upon the libel." And lord ch. just. Lee faid, in that case of Hynes v. Thompson, that he thought it must either be pleaded " that there was fuch a custom," or an affidavit of it. And Mr. Just. Chapple hinted, that prohibitions had been too eafily granted: And was of opinion, that there ought to have been an affidavit to verify the fuggestion.

In Driver v. Colgate, [mentioned also by Aston Just. in the same case of Buggin v. Bennett. Burr. 4 pt. 2039, 2040. The court held, that there was no necessity to plead it below in cases of prohibition for words spoken where they are by the custom actionable, as there is in case of a prohibition of suggestion of a modus. For in the former case, they cannot go on if the suggestion be true; but in the latter of a module—if the modus be admitted in the spiritual court, they may

go on, because the jurisdiction continues.

In all other cases the court laid down a general rule, "that the matter must either be pleaded below, or verified by affidavit." Vide Burr. Rep. 4 pt. 2040.

#### Where the Suggestion must be verified by an AFFIDAVIT.

As in case for a prohibition to the consistory court of London, in a cause for calling a woman "whore" in London, there must be an affidavit of the custom, and also that the words were spoken there. Theyer v. Eastwick. Burr. 4 pt. 2032.

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In C. B. on shewing cause why a prohibition should not be granted, it was objected, that no affidavit was filed, whereby the libel whereupon the plaintiff had moved appeared to be a true copy. Per. cur. The objection is good. Rule difcharged. Eaglesfield v. Anderson. Barnes, 427.

On a rule to shew cause why an attachment should not be granted against the Mayor of Marlborough, for refusing to accept the defendant's plea in his court, it was held not to be sufficient for a defendant in a court below to bring his plea into court, and offer to make oath of the truth of it; but that he must tender his plea with an affidavit annexed of the truth thereof, and that this must be done before a general imparlance; but that he might have prayed a special imparlance, and then have come to the next court and pleaded. It was also held, that the proper way of proceeding was not by attachment, but that a prohibition should have been moved for; and so the rule for an attachment was discharged. Vokens v. Cull, B. R. Hil. 12 Geo. 2. plead it below, before you can have a profibition; other

wife, where the cause of prohibition appears upon the libel. And total on just. Let faid, in that case of Hours v. Thomps

that it must ended to that there we pleaded that there we form a factor which it. And Mr. Yuft Charle hured, that prohibitions had been too eatily granted. And was of approach, that there ought to have been an affikayers

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Of granting a Prohibition absolutely, or hoc usque only.

PROHIBITIONS are granted either absolutely, or boc usque only till such an act be done; the first of these is peremptory, and ties up the inserior jurisdiction till a consultation is awarded; the second is inso discharged upon complying with the act, and that without any writ of consultation. 6 Mod. 208.

When a prohibition is moved for because a copy of the libel is denied, the court requires that oath should be made of the denial, and the prohibition is only quousque the copy be

delivered. Vent. 252. 2 Salk. 553. pl. 19.

The stat. 2 Hen. 5. stat. 1. c. 3. requires a copy of the libel in the ecclesiastical court to be given to the party sued there. But as this statute extends only to the ecclesiastical courts, a prohibition was denied to be granted to the admiralty court, upon a suggestion that they resuled to give the party sued there a copy of the libel. Ld. Raym. 442.

A prohibition quousque they give a copy of the libel, if it be granted before any libel exhibited, does not bind them from exhibiting any libel; but after, they shall not proceed

till they give a copy of it. 6 Mod. 308.

It was formerly held by all the judges, that when there was a proceeding ex officio in the ecclesiastical court, they were not bound to give the party a copy of the articles: but the law is otherwise: for in such cases, if they resuse to give a copy of the articles, a prohibition shall go quousque they de-

liver it. Ld. Raym. 991.

In G. B. a rule was made for civilians to be heard on both fides in relation to a prohibition. Dr. Lee attended to argue against the prohibition; but none would attend to argue for it, as by affidavit appeared. Per Cur. We ought to hear civilians on both fides, or not at all. Enlarge the rule: perhaps, when our opinion is known, a doctor may attend on the other fide. Afterwards no civilian attending to argue for the prohibition, the court would not hear doctor Lee against it. Barnes, 428.

A prohibition is not grantable the last day of term, but on motion, a rule may be obtained to stay proceedings till the

ensuing term. Latch. 7. 2. Roll. Rep. 456.

But a prohibition to an ecclesiastical court was granted the last day of term on motion, leave having been obtained the day before, "to move it then." Burr. Rep. 4 pt. 1922.

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# Of declaring in PROHIBITION, &c.

THE court feldom awards a Probibition upon the motion, but generally grants a rule nist, or that the adverse party should shew cause why it should not be granted. Cro. El. 16. 94. 5 Mod. 247. Ld. Raym. 86. 236. Wil. Rep. 7. pl. 2.

Also in nice and difficult cases it is usual to direct the plaintiff to declare in *Probibition*. Cro. El. 736. 4 Mod. 151. Lev. 125. Ld. Raym. 88.—and so proceed to iffue, that the merits of the cause may be brought before them with the greater exactness, and the court thereby be the better enabled to judge of the reasonableness of granting or refusing the writ. Stil. Prast. Reg. 43. F. N. B. 44.

When the court inclines to grant the motion for a prohibition, the defendant has a fort of right to infift that the plaintiff shall declare; but where the court inclines against the motion, the plaintiff has no such right, for there might be judgment by default, and the court be obliged to prohibit against their own opinion; and it is no injury to the plaintiff, as he may apply to another court. The King v. the Bishop of Ely. Mich. 30 Geo. 2.

so it appears, that leave to declare in prohibition is only granted when the court inclines to prohibit; not when it inclines to the contrary. Vide 1 Blacks. Rep. 81.

The court is not obliged to give direction for such declaration, but are absolute judges of the sufficiency or insufficiency of the suggestion. Leon. 181.

On shewing cause against a prohibition, the court made the rule absolute, with a direction that the plaintiff should declare in prohibition. He tendered a declaration, but the defendant refused it, and applied to stay the proceedings, as The other infifted he had a right being willing to fubmit. to go on, and so get at the costs of the motion, which he could not otherwise have; but the court stayed the proceedings without costs; saying, the direction to declare was in favour of the defendant, who might waive it. Gegge v. Jones. Stra. 1149. [Vide the statute 8 & 9 W. 3. c. 11. f. 3. which gives costs in prohibition upon plaintiff's obtaining judgment, or any award of execution after plea pleaded or demurrer joined] but the plaintiff can recover no costs in prohibition, unless he has execution after plea or demurrer and judgment for him: but then after such judgment and execution, after plea or demurrer, the costs shall be taxed from the fuggestion, so as to take in the motion. Wills v. Turner. Hil. 2 Geo. 1. C. B.

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## Of declaring in PROHIBITION, &c.

Where the party is ordered to declare in prohibition, he ought not to take out the writ, but ferving the other fide with a rule is sufficient; and if in that suit he obtain judgament, the judgment is step probibition, otherwise it is quod eat consultatio; therefore if the party be excommunicated, the mandatory part of the writ to assoil the party is not to be obeyed till after trial had. The Dean and Bishop of Wells.

Mich. 25 Geo. 2. dan a ne bondor outh as nog

It was at the defendant's instance made part of the rule whereby a writ of prohibition was granted, that the plaintiff should declare in prohibition. Defendant afterwards demanded a declaration, and threatened a nonpres for want thereof. Whereupon a declaration was prepared: and when it was ready, he was told by defendant's agent that he need not deliver it; but as he had been at the trouble and expence in preparing it, he delivered the fame, and called for a please Defendant pleaded nothing to the merits, but only that he did not proceed in the spiritual court after the prohibition, gave a rule to reply, and demanded a replication. Whereupon plaintiff applied to the court, and obtained a rule for defendant to shew cause, why he should not pay the plaintiff's costs of the proceedings in prohibition. Which rule was made absolute. The court looked on the plea to be a fham nugatory plea, and not to the merits of the cause: the allegation, that defendant has proceeded, contrary to the prohibition, is and must be put into every declaration of this kind: but whether he has so proceeded, or not, is totally immaterial. The flat. 8 & 9 W. 3. c. 10. f. 3. gives costs after plea or demurrer: but this is not a plea within the statate. Seed v. Wolfenden. Barnes, 148.

In cases of tythes and such fort of matters where many things are in controversy, it is very frequent to order the prohibition to stand as to part, and a consultation to go as to

the other part.

Venero

If the declaration in prohibition varies from the fuggestion, this is naught, and a consultation shall be awarded. 7 Mod.

113. Leon. 128. For the furmise is as the writ.

The declaration in prohibition is founded upon an attachment for a contempt, and therefore the declaration in prohibition is a qui tam declaration, for it supposes a contempt to the king in proceeding after the writ delivered. 12 Co. 61. But the contempt is but form, and the jury need not give any verdict about it. Stra. 482.

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# Of declaring in PROHIBITION, &c.

Where an iffue is joined on a declaration in prohibition, if the jury find a verdict for the plaintiff, yet they shall give no more than one shilling damages, for it is in nature of an iffue to inform the conscience of the court. Carter v. Leeds. Mich. 2 Geo. 2. But after the plaintiff has had judgment quod stet prohibitio, he may bring his action upon the case, and recover the damages he has sustained.

If the jury, upon an issue joined in a prohibition de mode decimandi, find a different modus, than that alledged by the plaintiff, yet the defendant shall not have a consultation; because it appears that he ought not to sue for tythes in specie,

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there being a modus found. Vent. 32.

The declaration ought to shew a place where the defendant proceeded, after the prohibition served; otherwise, the plaintiff shall not have judgment, though the writ of enquiry finds damages. I Vent. 348. 350. Ray. 387. 2 Jones 128. 2 Show. 145.

Two persons cannot join in the declaration, where the cause of complaint is several. Cro. Car. 162.

If the libel be against several parishioners, who all insist upon the same modus, they cannot join, but must have several prohibitions. Yel. 128. R. Raym. 425.

If there appears cause for a prohibition, there shall not be a consultation, though the declaration be desective for want of form; as because there is not the profess of a deed, or letters-patent. Per Coke. 1 Rol. 332.

After a rule given to declare in prohibition, the defendant may submit and stay proceedings. Stra. 1149.

The declaration in prohibition was ordered to be amended by a judge, but the amendment not being warranted by the fuggestion, or the acts of the spiritual court, the order was

Since the 8 & 9 W. 3. c. 10. giving plaintiff in prohibition, obtaining judgment, or any award of execution after plea or demurrer, his costs, it has been held, that these costs commence from the suggestion, which is taken to be the commencement of the suit, in lieu of an original writ-in prohibition; and if a seigned issue is directed, and sound in plaintist's savour, he shall have the costs of that too. Palmer v. Williams, Clerk. Barnes, 130.

The stat. 8 & 9 W. 3. extends only to cases after plead pleaded, or demurrer joined; but if there be judgment by default, and the plaintiff have damages on a writ of inquiry, for the contempt in proceeding after the prohibition

# Of declaring in PROHIBITION, &c.

delivered (which is confessed by the default) he will be entitled to costs at the common law. However, as this part of the declaration is no more than form, costs are allowed only from the time of a rule for prohibition. Sir E. Bettison

v. Dr. Hinchman. Mich. 7 Geo. 1. C. B.

After a verdict for defendant in prohibition as to part, the question was, whether he should be allowed costs pursuant to the statute Will. 3. or not? In quare impedit if desendant has judgment, a writ is awarded to the bishop: in replevin, a writ of retorn. habend. and costs are given to the avowant, in some cases, by the stat. 21 Hen. 8. In prohibition, by 4 Jac. 1. a consultation is given, and since the stat. Will. 3. costs, &c. if verdict, &c. pass against the plaintist. Rule that judgment be entered, for a consultation as to part, and for costs. The pastea was agreed to be altered, with respect to finding that plaintist proceeded in the spiritual court after the writ of prohibition delivered to him, which is material. Malton qui tam v. Acklam & al. Barnes, 138.

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## Of granting a Consultation, &c.

F a prohibition be granted without notice to the other party, and upon motion it appears that there was no cause for it, the court will grant a confultation\*, without putting him to declare upon the prohibition. Gro. Car. 97.

So, after a prohibition granted, if upon trial the matter be found for the defendant, generally, a confultation shall

So if the matter found for the defendant varies in words, but not in substance, from the suggestion; as if the suggestion be, that two thirds of the tythes belong to the plaintist, and the verdict is two entire parts of all tythes.

So if there be a material variance between the fuggestion for a prohibition, and the libel in the spiritual court, there mush to be a confultation; for the prohibition ought to be sounded upon the libel; as if the libel be for tythes of corn, and a modus be suggested for tythes of hay, upon demurrer to the declaration in prohibition, a consultation shall go. It. 79.

So if there be a variance in quantity, as if the libel be for two hundred faggots of wood, and the fuggestion be for twenty only. Yel. 79.

So after a prohibition granted, if it appears that the spinitual court has conusance for part, a consultation shall go quad, &c. 12 Co. 44.

So if, after a prohibition granted, it be not served till kntence and appeal, it cannot be afterwards used. Gro. Jac. 429.

But a consultation shall not be granted except in term. 12 Co. 41.

Nor by a judge, but only in court. Ibid.

Nor after a declaration upon a prohibition, it shall not be granted upon motion before plea or demurrer. Cro. Car.

Nor shall a confultation go, where a verdict is found for the defendant, if it appears upon the whole matter that the spiritual court has no conusance; as if a prohibition be upon a suggestion, that all lands in A. are discharged by a radus, and there is a verdict for the desendant, because it is

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A writ of confultation is so called, because, upon deliberation adconsultation had, the judges find the prohibition ill sounded; and therefore by this writ, they return the cause to its original unsidiction to be there determined.

Vol. II.

## Of granting a Consultation, &c.

found that all, except ten acres, are within the modus; yet a consultation does not go for such mistake in the issue, if the libel was not for tythes of the ten acres. 2 Rol. 320.

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So if the suggestion was of unity, ratione cujus he shall be discharged, and a verdict finds that he shall not be discharged ratione inde; though it be against the plaintiss, yet being impertinent, for the fact to be tried was, whether there was an unity, &c. a consultation does not go? 2 Rol. 320. 1. 35. 11 Co. 15.

So, though there be an immaterial variance between the fuggestion and the libel, a consultation does not go: as if the suggestion be for a total discharge upon the stat. 31 H.8. and recites the libel to be for twenty faggots, where it was for two hundred; for it was not material for what quantity the libel was, when the plaintiff claims a discharge for the whole. Yel. 75.

So if the fuggestion varies in quantity from the libel, if it be conformable to the copy of the libel delivered by the spiritual court, this variance shall not be a ground for a

confultation. 2 Rol. 329. 1.45.

A writ of consultation is to the following effect:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and for forth. To the right worshipful J. C. master of arts, vicar general, and principal official of the episcopal or consistorial court of \_\_\_\_ &c. Whereas C. D. lately in the court christian before you impleaded A. B. by the name and description of A. B. of the parish of in the county of Devon, for this, that by the laws, &c. [Here fet forth the substance of the libel as by the libel of the faid C. D. amongst other things more fully appears And whereas the faid A. B. has lately profecuted and caused to be directed to you our certain prohibition out of our court, before our justices at Westminster, that you should no farther hold the plea aforesaid, in the court christian aforesaid, before you or any thing far ther in that behalf attempted, by pretence of which ou faid prohibition you have from thence hitherto delayed, and yet do delay further to proceed in the cause aforesaid, as w have understood, to the great damage of the said C. D. an to the manifest prejudice of the ecclesiastical liberty.-Wherefore the faid C. D. hath in our court, before our fai justice

## Of granting a Consultation, &c.

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justices at Westminster, humbly besought us to grant him our aid and affiftance in this behalf; and we favourably confenting to the petition of him the faid C. D. and being unwilling that the cognifance, which to the ecclefiaftical court in this behalf belongs, should be further delayed by fuch false and subtle affertions; because in our said court, before our said justices at Westminster, it is in such manner proceeded, that it is confidered by the fame court, that the faid C. D. may have our writ of confultation to the court christian aforesaid, our said writ of prohibition to the contrary thereof notwithstanding, whereof the said A. B. is convicted, as it appears to us on record. We therefore being unwilling that the faid C. D. should be in any wife injured in this behalf, fignify to you, and command, that you may in that cause lawfully proceed and further do what you shall know to belong to the ecclesiaftical court, our faid prohibition to the contrary thereof before to you directed in any wife notwithstanding.

Withels Sir William de Grey, knight, at Westminster, the day of, &c.

Note, When the court grants the writ of prohibition, such writ is not absolutely final and conclusive, even in ordinary ales. For though the ground be a proper one in point of aw, for granting the probibition, yet, if the fast that gave rife wit be afterwards fallified, the cause shall be remanded to the prior jurisdiction.—If for instance, a custom be pleaded in the bintual court, a prohibition ought to go, because that court has no authority to try it; but if the fact of such a custom be brought to a competent trial and be there found false, a writ of senfultation will be granted. And for this purpose it is, that the party prohibited may appear to the prohibition, and ke a declaration (which must always pursue the suggestion) and so plead to iffue upon it; denying the contempt, and traterling the custom upon which the prohibition was grounded: and if that issue be found for the defendant, he shall then have writ of consultation. To yd bodgarona was ala on you have from thence hitherto delayed, and

understood, to the great damage of the faid G, D, and the matter president of the ecolefialtical liberty—

2. It is our court, refere our to

ty further to proceed in the cause aforesaid, as w

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Where a Prohibition may be granted after a Consultation awarded, and where not, and of Disobedience to the Writ of Prohibition.

BY the 50 Edw. 3. c. 4. "It is ordained and stablished, That where a consultation is once duly granted upon a prohibition made to the judge of the hely-church, that the same judge may proceed in the cause by virtue of the same consultation, notwithstanding any other prohibition to him thereupon delivered: Provided always, that the matter in the libel of the said cause be not engrossed, enlarged, or otherwise changed."

Judge of holy-church, means spiritual judge; and therefore, this statute extends not to the court of admiralty. 2 Brown!

39.

Same judge, means ecclefiastical judge in general, or perfon competent, and not to the same individual person. Pop.

159. Palm. 418. Latch. 6. 75.

This statute hath been construed to extend to those cases only where a consultation hath been lawfully granted; that is, upon the right and merits of the thing in question, and not to such cases where for defect of form, misprisson of a clerk, mispleading an act of parliament, &c. consultations have been awarded. 2 Browns. 26. 247. Leon. 130. 3 Bulft. 182. Meor, 917.

And therefore regularly, where a consultation was awarded upon the merits, the party shall not have another prohibi-

tion upon the same suggestion.

Though he appeals, and then prays another prohibition.

R. Pop. 159. Lat. 6. 1 Rol. 378. Moor, 919.

Though the consultation be granted by another court.

And though he varies in the modus upon which the former

prohibition was had. 1 Rol. 378.

But if a consultation was awarded for want of form in the suggestion, or proceeding thereon, another prohibition

may be allowed. Cro. Car. 208.

So if the consultation was awarded for want of proof of the fuggestion within the six months, pursuant to the statute 2 & 3 Edw. 6. the plaintist is not precluded, but may bring another prohibition, [but then he must pay double costs according to the statute, Carth. 463.] for this statute of Edward 3. goes to the suggestion made upon the same libel, and to a consultation duly granted, and not to the case of

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Where a PROHIBITION may be granted after a Consultation awarded, and where not, and of Disobedience to the Writ of Pro-

not having witnesses ready to prove the suggestion through negligence. But it was said by Holloway just that after a consultation awarded for not proving his suggestion, &c. the party shall be for ever barred from having another prohibition on the same libel. Comb. 63.

But if, after a consultation for want of proving his suggestion, the party appeals, there may be another prohibition to the court, to which the appeal was, upon the same

Suggestion. 2 Rol. 500.

So if after a confultation the libel is enlarged or changed.

2 Rol. 207.

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So if a consultation goes for a collateral matter, as if the plaintiff was nonsuited. Com. Dig. 4 Vol. 484. But. Keb. 286.—If upon the trial of a suggestion the plaintiff be nonsuit, no new prohibition shall be granted, although the nonsuit was occasioned for want of some of the plaintiff's witnesses, who were to prove the truth of the suggestion, and who were necessarily obliged to be absent.

But where the suggestion was for a modus of tythe of lambs in the parish, and a consultation went, another prohibition shall go upon a suggestion of the same modus in a particular farm. 2 Vent. 47. This case is reversed there.

So if a consultation goes, and there be afterwards a new libel for the same species of tythes in another year, a prohibition shall go upon the same suggestion as was tried before. Yel. 102.

And if a consultation goes, and the party against whom appeals; the appellee may have a prohibition, though the

appellant cannot have it. Pop. 159.

So if, after a consultation, the plaintiff pleads the same matter (which was suggested and sound against him at common law) in the spiritual court, which is accepted, and proceeds there for a trial, the former defendant may have a new prohibition: for they cannot try in the spiritual court, a matter determined at a trial at law, which was proper to be there tried, as if a discharge within 31 H. 8. was suggested. 2 Rol. 319. 1. 45. Hob. 286.

If the ecclesiastical court refuse to grant a copy of the libel for which a prohibition is granted, and thereupon they grant the copy, and afterwards proceed in the cause, the

J 3

Where a Pronibition may be granted after a CONSULTATION awarded, and where not, and of Disobedience to the Writ of Pro-HIBITION.

matter not being within their jurisdiction, another prohibi-

tion lies. Moor, 917.

If the defendant in prohibition dies, his executors may proceed in the ecclefiaftical court, and the judges of the court out of which the prohibition was granted will also in fuch case make a rule to the spiritual court to proceed: But then the plaintiff may, if he pleases, have a new pro-

hibition against the executors. Lil. Rep. 155.

The disobeying a prohibition is a contempt to the fuperior court that awards it, and punishable by attachment, which iffues against the judge and party for proceeding after fuch prohibition, and for which they are subject to fine and imprisonment, according to the direction of the superior court. F.N.B. 40. Bro. Att. Pro. pl. 5. 9. 11. and 279. Tho' the writ was not directed to the party. 19 H. 6. 54. And fuch attachment may be awarded against a peer of the realm. 21 Ed. 3. 3pl. 7.

An attachment was granted upon an affidavit that the party proceeded after a prohibition delivered to him, in a fuit for a feat in the church, which the plaintiff claimed by prescription; and upon his appearance and examination upon interrogatories, he confessed the matter, and was fined five marks. Dr. Wainwright's case. 2 Jon. 47.

And not only an attachment lies for proceeding in the fame cause pending a prohibition, but also for instituting a new fuit for the fame thing; as if a person libels for tythes, and a prohibition is brought, and he libels for tythes of another year, the first not being determined, an attachment Leon. 111. Moor, 599. shall be awarded.

And in an attachment upon a prohibition, the plaintiff shall recover damages and costs against the party, for proceeding after the writ of prohibition awarded. Cro. Car.

559. 2 fon. 128. Vent. 348. 3 Lev. 360.

Note, In the cases of prohibitions, where they were granted on motion, the ancient course was, that the party prohibited, fued out a scire facias quare consultatio non debet concedi post prohibitionem; in which writ the fuggestion was recited, and also a prohibition granted thereon, ad damnum of the partyafterwards this practice was altered, and the course came to be thus, (viz.) Upon granting a prohibition to the plaintiff,

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Where a Profibition may be granted after a Consultation awarded, and where not, and of Disobedience to the Writ of Profibition.

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the court bound him in a recognizance to profecute an attachment of contempt against defendant, for suing in the Spiritual Court after a prohibition granted, and then to declare upon the prohibition.—So that he who was the defendant in that court, is now become actor or plaintiff in the court above,

If he direbeying a problem is a contents to the by verior court that awards it and positionable by artainment which thus againft the urdge and party for mooreofding and fuch they are subject to bee and uraphionment, according to the addrection of the fuperior courts \$ N.B. to Bed in \$P^\* \cdot N \cdot S \cdot C \cdot N \cdot S \cdot S \cdot N \cdot S \cdot S \cdot N \cdot S \cdot S \cdot S \cdot N \cdot S \cdot S \cdot N \cdot S \cdot S \cdot S \cdot N \cdot S \cdot S \cdot S \cdot N \cdot S \cdo S \cdot S \cdot

An anaconear was granted spon an airday to that the party proceeded after a probletion delivered to him, in a fuit for a tent in the church, which the plaintiff claimed by professions, and upon his appearance and examination upon interrogatories, he contend the matter, and was treed the matter. By the contends the matter, and was

fame caute pending a probabilision, but also for inflituting a new fait for the fame slong, as if a perfect libris for tythes, and a probabilion is brought, and he libris for tythes another year, the full nor lang sheemaned, in attackfine

And in an arrachment upon a prohibition, the plaintift that recover damages and colls againft the party, for proceeding after the writ of prohibition awarded, Gra. Gar.

Note: In the cales of problemons, where they were granted on memory the ancient coarks was, that the party prohibited for the last a being quarter consistent control political coat a being furior quarter consistent political was recited, and the a problemon granted the con, ad damanic of the party-

afforwards this practice was altered, and the course came to be the present to the plaintiff.

# 296 Of Quare Impedit.

Of the Writ of QUARE IMPEDIT, and Appearance thereto, &c.

Quare impedit is a possession brought in the Common Pleas by all except the king, who may bring it in B. R. or C. B. F. N. B. 32. E. and is now the only action used in case of the disturbance of patronage to a church or ecclesiastical benefice; the assize of darrein presentment, which lies only for disturbance where a man has an advowson by descent from his ancestors, having fallen into disuse, as the writ of quare impedit is equally remedial, whether a man claims title by descent or purchase. 3 Blackst. Com. 246.

In order to bring a quare impedit, the party applies to the cursitor for an original writ out of Chancery, which is to this effect:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, &c.

To the Sheriff of \_\_\_\_\_\_ greeting. Command Thomas, bishop of \_\_\_\_\_\_ and C. D. Esquire, that justly and without delay they permit A. B. to present a fit person to the church of \_\_\_\_\_\_ in the said county, which is void, and in the gift of the said A. as he saith, and whereof he complaineth, that the said bishop and C. D. unjustly hinder him; and unless they shall so do, and the said A. shall give you security that his suit shall be prosecuted, then summon by good summoners the said bishop and C. D. that they be before our justices at Westminster, from \*\_\_\_\_\_ to shew wherefore they will not do it, and have you there the summoners and this writ.

Witness ourself at Westminster, the — day of — in the twentieth year of our reign.

The Sheriff's warrant thereon.

to wit. John Williams, Esquire, Sheriff of the county aforesaid, to O. P. Q. R. &c. jointly and severally, by virtue of his majesty's writ to me directed, I command you, that you or some or one of you command Thomas, bishop of —— and C. D. Esquire, that justly and without delay, they permit A. B. to present a fit person to the church of —— which is void, and in the gift of the

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<sup>.</sup> Must have at least fifteen days between the teste and return.

# Of the Writ of QUARE IMPEDIT, and Appearance thereto, &c.

By the same Sheriff.

By the flat. of Marlbridge, 52 H. 3. The Sheriffs ought to make furnmens by good furnmeners, and return their names upon the original. 1 Brownl. 158.

And the fummons ought to be served on the defendant, or

at the church door. Ibid. 2 Mod. 265.

The defendants may have the common effoign, or de malo leti. 2 Inft. 124. but no other effoign. 2 Inft. 125. I Brown!. 160.

And if the defendants effoign, the plaintiff ought to adjourn it for 15 days, otherwise he shall be nonsuited. I Brownl. 159. Dal. 81.

Upon default of appearance, and no essoign, the plaintiff sall have an attachment, and afterwards a distringus. 2 Inst.

And, by the common law, the process to compel an appear-

ance was by distress infinite. Ibid.

But now by the flat. of Marlbridge, if the defendant does not appear, nor cast an effoign on the first distress, or before, there shall be judgment for the plaintist, and a \* writ to the bishop. 2 H. 4. I b. 2 Inst. 124. I Brownl. 158. Dy.

But if the party be not actually summoned, there shall not be judgment upon default at the distress. I Mod. 248. 2

Mod. 264.

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By the common law, and now by the stat. art. sup. chart. In summonses and attachments, there ought to be 15 days exclusive between the teste and return at least. 2 Inst. 567.

And

<sup>\*</sup> i. e. A writ ad admittendum clericum; but then, before such writ, there must be a swrit of inquiry to inquire of four points, which wide post.

Of the Writ of QUARE IMPEDIT, and Appearance thereto, &c.

And by the stat. of Marlbridge, in quare impedit, or dar. rein presentment, there ought to be only 15 or 21 days before the return.

And the summons ought to be tested the same day it issues, that there may be no prejudice in respect of lapse. Reg. 30. a. Bro. Du. Imp. 151.

If the injury done to the plaintiff, or the delay, arises from the bishop alone, as upon pretence of incapacity, or the like,

then he only is named in the writ.

But if there be another presentation set up, then the pretended patron and his clerk are also joined in the action.

Or it may be brought against the pretended patron and his clerk, leaving out the bishop.

Or against the patron only.

But it is generally brought against all three—for if the bishop be left out, and the suit is not determined till fix months are past, the bishop is intitled to present by lapse; but if he is named, and is made a party to the suit, no lapse can possibly accrue till the right is determined; and therefore it is always most adviseable to make him a party. Cro. Jac. 93.

If the patron is left out, and the writ is only brought against the bishop and the clerk, the suit is of no effect, and the writ shall abate. Hob. 316. For the right of the patron

is the principal question in the cause. 7 Rep. 25.

And if the clerk is left out, and has received institution before the action brought (as is sometimes the case) the patron plaintist, by his suit, may recover the right of patronage, but not the present turn; for he cannot have judgment to remove the clerk, unless he be made a desendant and part to the suit to hear what he can alledge against it: for which reasons, it is the safer way to insert them all three in the writ.

If the clerk of the pseudo patron has not been instituted, of if the plaintiff suspects that the bishop will admit the defendant's, or any other clerk, pending the suit, he may, immediately upon suing out the writ of quare impedit, sue out also a prohibitory writ, called a ne admittas; which recites the contention begun in the king's courts, and forbids the bishop to admit any clerk whatsoever, till such contention be determined. The writ of ne admittas is to this effect;

GEORGE the third, by the grace of God, of Great Britain France, and Ireland, king, defender of the faith and forth Of for

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Of the Writ of QUARE IMPEDIT, and appearance thereto, &c.

forth: To the reverend father in God, Thomas, by divine providence, bishop of ---- greeting. We prohibit you, that you admit a person to the church of which is void, as it is faid, and concerning the advowfon whereof, an action is commenced in our court of the Bench, between A. B. Efq; and you and C. D. Efq; until it shall be discussed in the said court, Whether the said advowson belongeth to the said A. or to you and the said C. Witness Ourself at Westminster, the in the twentieth year of our reign, &c.

If the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found ma \* jure patronatus, then the plaintiff, after he has obtained adgment in the quare impedit, may remove the incumbent, the clerk of a stranger, by writ of scire facias. 2 Sid. 94. and shall have a special action against the bishop, called a ware incumbravit, to recover the prefentation, and also satisaction in damages for the injury done him by incumbering the church by instituting the clerk, pending the suit, and ster the ne admittas received +.

If one defendant should appear before the others, the plainiff may declare against him fimul cum, &c. 1 Brownl. 159. And note: Summons and severance lies if one plaintiff

mil not fue. 1 Brownl. 158.

And if the writ abates it may be brought by journies acumpts. Ibid.

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Britain and R forth

The writ may be general, and the count thereon special. F. N. B. 33. a. 5 Co. 102. b. 10 Co. 135.

t But if the bishop has incumbered the church by instituting clerk before the ne admittas issued, no quare incumbravit lies: for he bishop hath no legal notice, till the writ of ne admittas 13

fived upon him, 500 to 328

<sup>\*</sup> A jure patronatus is a commission from the bishop, which he bound to issue if requested by either of the contesting patrons, otheir clerks, directed usually to his chancellor, and others of competent learning, who are to summon a jury of fix clergymen, and fix laymen, to inquire into and examine who is the rightful patron. 1 Burn. 16, 17.

## Of Declaring in QUARE IMPEDIT.

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OUAR E impedit being a possessory action, cannot be main. tained without a possession; for which reason the plaintiff must always declare upon a presentation made by himself, or his ancestor, as one whose estate he hath, or by the grantes of the next avoidance, or by his leffee for life or years.

And the plaintiff in his declaration must shew a title to

present.

And if he claims a right to present against common right he must shew the commencement of it; as if he alledge presentations by turns he must shew how this commenced by prescription, composition, or otherwise. Dy. 299. 3 Leon.

And the plaintiff must shew a title in him before the avoid

ce. Dyer 129. b. Bend. pl. 79.
And if there are several plaintiffs, and they vary in title

the writ abates. R. Mod. 184.

The plaintiff ought also to alledge a presentment by him felf or his ancestor, or some other under whom he claims Vaug. 7. 17. 57. But though it is generally necessary to alledge a presentment, the want thereof will be cured by verdict. Stra. 1006.

In a quare impedit for a united church, the patron ough to shew a presentation either to the united church, or to on of the old churches. Vide Ld. Raym. 201, 202.

A purchaser may alledge a presentment by the vender.

Inft. 356.

And if the plaintiff alledges a presentment without a prece dent title, he must say it was tempore pacis. I Mod. 230.

But he need not, if a precedent title is alledged. R. 1 Mod

230.

And if a presentment be alledged by a common person h must say, that the clerk was thereon instituted and inducted

Bend. pl. 297.

The last presentment regularly shall be mentioned; an therefore if the bishop presents by lapse, upon the next avoid ance the patron in quare impedit shall make mention of that 3 Leon. 18. Dal. 75.

And the plaintiff ought also to alledge a diffurbance.

And if the fuit be by an executor or administrator, upo an avoidance in the life of the testator, an allegation of the disturbance in the life of the testator is sufficient. R. Sav. 9 Lut. 2.

Note, Of amending the declaration in quare impedit. Vide vol. title of the declaration, of amending the declaration, &c.

## Of Pleading in QUARE IMPEDIT.

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THE pleading in this action is very difficult, by reason of the variety and uncertainty of the rules concerning it. And therefore Lord Hobart advises plaintiffs in quare impedit, no name no more defendants than needs must be; and particularly the bishop not to be named, if an incumbent be instituted before the quare impedit brought; for then the institute pending the quare impedit. 2dly, Not to name more disturbers than such as are like to have reasonable ides; for every disturber may make several titles, or confess and avoid the plaintiff's title, and if any pass against him he isbarred. Hob. 320.

To a declaration in quare impedit the defendants may imarl—and afterwards may either join or plead feverally.

And they may plead in abatement, or to the action.—But the ordinary cannot plead in abatement, or cast an esseign without making himself a disturber. Hob. 200.

Every defendant may plead the general issue, which is ne issue pas; because the plea doth not defend the wrong merewith he stands charged, and leaves the plaintiff's title to only uncontroverted, but in effect confessed; and the limitiff may upon that plea presently pay a writ to the bishop, at his choice maintain the disturbance for damages. It has choice maintain the disturbance for damages.

But the bishop generally, when made a party to the suit, of shew that he is not a disturber, pleads in bar of the action, that he claims nothing but as ordinary. Hob. 198. Int. 43. a. Co. Ent. 498. d. 38 Ed. 3. 2.

He must disclaim, or admit himself a disturber. Hob. 320. and if he resuses a clerk, without cause, he is a disturber. Leon. 230.

Upon such plea by the bishop, the plaintiff may have beginnent against him with a writ, but a cessat executio till to other pleas are determined. Hob. 320. Vau. 6. Keil. 3. But if a cessat executio is not entered, it is only form. 180l. 363. But if there be not a cessat executio, it is error, execution be before the other pleas are determined.

If the clerk of the pseudo-patron has been instituted, he therally pleads, that he claims nothing but as persona imfonata ex presentatione of such a one. Or he may plead thanty of the plaintiff, or a stranger; and by the common

## Of Pleading in QUARE IMPEDIT.

law, plenarty, before the writ for any time, was a good plea. 2 Inft. 360.

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But now by the stat. West. 2. c. 5. It must be plenarty for fix months before the action brought to be a sufficient har of the plaintist's action, to recover the presentation, if the

plaintiff prevails.

In pleading plenarty for fix months, by the presentment, either of the plaintist himself, or by collation, or by lapse by the ordinary, the incumbent need not make title. Noy 30. But where he pleads the presentment of a stranger, he ought to shew title. But plenarty, even for fix months, is no plea against the king, according to the rule, nullum tempus occurrit regi. 2 Inst. 361.

The defendant patron, if he does not rely on the general issue, or plead a release, must set up a title, and traverse the plaintiff's; but if he shews a title, subsequent to the plaintiff's, he need not traverse the plaintiff's title, for then

he confesses and avoids it.

In replying to the defendant's plea and title, it is not fufficient for the plaintiff to destroy that title, without

maintaining his own title. Vaugh. 60.

The contesting parties go on to iffue or demurrer, and the proceedings therein are the same as in other cases; but in this action the plaintiss must recover upon the strength of his own right, and not by the weakness of the defendant's. Vaugh. 7, 8.

Upon the trial the plaintiff is put to make out his own title; and upon failure thereof, the defendant is put upon the proof of his, in order to obtain judgment for himself,

if needful.

If upon the trial the right be found for the plaintiff, the jury are to inquire of four things—1. Whether the church is full. 2. Of whose presentation; for if it be of the defendant's presentation, his clerk is removeable, if made a party to the suit, and the plaintiff commenced his action in due time, i. e. infra tempus semestre, by writ. 3. In case of plenarty upon an usurpation, whether six calendar months have passed between the avoidance and the time of bringing the action; for if six months [calendar months, not lunar, as in temporal matters] have passed, it will not be within the statute Westm. 2. which permits an usurpation to be divested by a quare impedit brought instra tempus semestre, 2 Inst. 361. 4. Of what value yearly the living is, and this in order to assess damages according to the stat.

## Of Pleading in QUARE IMPEDIT.

West. 2. before which statute no damages were allowed; but by that statute, if fix months pass by the disturbance of any, so that the bishop do confer to the church, and the patron loseth his turn, damages shall be awarded to two years value of the church; and if six months be not passed, but the presentment be deraigned within the said time, then damages shall be awarded to the half year's value of the church.

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I has concelling parties, as so to quite newsmarrer, and the proceedings therein are the lime as the other cates; but to ene action the parties that recover upon the fireign

of this own right, as early the variousle as the defendants.

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Tell 22 the whole prepared to be at the of the defendant's presentation. Also church a removemble, it made a party

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## Of the Verdict, Enquiry, &c.

FF all the defendants make default upon the diftrefs, the plaintiff has judgment against all, for all are supposed diff turbers. R. Mod. 81. and that without title made. F. N. B. 38. 11. Semb. cont. 1 Brown 158.

But if the plaintiff recovers upon demurrer, there must be a writ of inquiry issued to inquire of the preceding four points. before the plaintiff has final judgment, and a writ to the

bishop. R. Med. 81.

Or after a verdict for the plaintiff, if the jury have omit ted to inquire of these points, there shall be a writ of inquire and till this is executed, the writ to the bishop shall stay, 1 Bro. Ent. 327.

If the patron and incumbent confess the action, or nil dicunt, &c. there shall be judgment for the plaintiff, and a

writ to the bilhop. ramer and venerally which ad darung a

Suippres,

If the church remains void, the plaintiff shall recover no damages; and if the jury affefs them, a remittitur de damnis

must be entered. 3 Lev. 59. 2 Inft. 362.

The damages are to be recovered against the disturber; and therefore if the incumbent counterplead the title of the plaintiff as well as the patron, the plaintiff shall recover the value as well against him as against the patron. But no damages shall be recovered against the bishop, where he claims only as ordinary—and note, The king is not within the statute, because, by his prerogative, he cannot lose his presentation. 6 Co. 52.

The witt ad admittendum elericum, is to this effect GE GEORGE the third, by the grace of God, of Great britain, France, and Ireland, king, petender of the faith, and so forth. To the reverend father in God, Tromas, by divine permiffion, bifhop of \_\_\_\_\_\_recting : Whereas A. B. has lately in our court, before our judices of the beach, at Welminster, by the confideration of the lame court, recovered against you and k. F. ders, and C. D. his prefentation to the rectory and parith church of in our county of ---- and cour diocele, which became vacant, and belongs to his prelentation ! And where-You it was confidered by our faid court of the Bench, that e faid A. should have our writ to you the said bishop. the fa the ordinary of that place, to be directed; and notwished the or ftandi flanding your disclaimer, and the claims of the taid he F and C. D. or either of them, you fi ould admit a lit perion to the rectory and parish aforefaid, at the prefentation of the field A. 'We therefore commend you, that notwith-Vo

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## Of the Judgment in QUARE IMPEDIT, &c.

IF it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover his presentation; and if the church be sound to be full, by the institution of any clerk, to remove him, unless it were filled pendente lite, by lapse to the ordinary, he not being a party to the suit, in which case the plaintiff loses his presentation pro hac vice, but shall recover two years sull value of the church from the defendant, the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of his insolvency, he shall be impossioned for two years. Stat. West. 2. s. 5. 5. 3.

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If the action was commenced within the fix months, and the plaintiff have judgment to recover his presentation, and the church be full, whereby the former presentment will be deraigned, then damages shall be awarded to the plaintiff for half a year's value of the church.

Upon the plaintiff's recovering his presentation, the writ issued in consequence thereof is a writ directed to the bishop, alled a writ ad admittendum clericum; which recites the independent of the court, and orders him to admit and institute the clerk presented; and if upon this order he does not admit him (the clerk being duly qualified) the patron may see the bishop in a quare non admissit, and recover ample satisfaction in damages.

#### The writ ad admittendum clericum, is to this effect:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To the reverend father in God, Thomas, by dvine permission, bishop of - greeting: Whereas A. B. has lately in our court, before our justices of the Bench, at Westminster, by the consideration of the same court, recovered against you and E. F. clerk, and C. D. his presentation to the rectory and parish church of in our county of \_\_\_\_\_ and your diocese, which became vacant, and belongs to his presentation: And whereupon it was confidered by our faid court of the Bench, that the faid A. should have our writ to you the faid bishop, the ordinary of that place, to be directed; and notwithflanding your disclaimer, and the claims of the said E. F. and C. D. or either of them, you should admit a fit person to the rectory and parish aforesaid, at the presentation of the said A. We therefore command you, that notwith-VOL. II.

## Of the Judgment in QUARE IMPEDITAGO

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standing your disclaimer, or the claims of the said E. P. and C. D. you admit a fit person to the rectory and parish church aforefaid, at the presentation of the said A And how you shall have executed this our writ, certify to us on - wherefoever we shall then be in England. Wit. nois Sir William De Grey, knight, at Westminster, the in the twentieth year of our - day of reign, Ga

By the Rat. of Weam. 2. c. 30. The judge of nifi prins has power to give judgment immediately; vet if he do not upon return of the pofice, judgment may be given by the court to which the return is made.

If the plaintiff is nonfuited, the judgment is perempton, and the defendant shall have a writ ad admittendum clericum to the bishop. I Brownl. 161. but not before title made, F. N. B. 38. K.

But if he has judgment upon demurrer, he shall have a

ed damag

writ to the bishop presently.

But the defendant cannot have a writ to the bishop, if the quare impedit abates for form, milnomer, or infufficiency.

R. 7 Co. 27. b. F. N. B. 38. M. of garval sat bas ston t

Note, If the ordinary does nothing upon the writ ad admittendum clericum, the party may have an alias and pluries, which may be returnable, and after that an attachment. Reg. 42. a. 80. F. N. B. 38. c. Dy. 254. h. 350. 4.

There was a fine of 101. for a bad return upon the first writ, and an alias under the penalty of 1001. 3 Leon.

If the incumbent, of which the church is full, was not a party to the writ, he shall never be removed. Co. Lit.

By the 3 Hen. 7. c. 10. [which gives costs upon writs of error brought if judgment be affirmed] If the defendant bring a writ of error, and the judgment be affirmed, the plaintiff shall recover his costs and damages for his wrongful delay.

By virtue of this statute, the court of King's Bench have, upon a writ of error, awarded damages according to the value of the church found by the verdict. Cro. Fac. 145.

But as the real damages which the plaintiff fustains is only the being kept out of the half year's value, the legal legal

## Of the Judgment in QUARE IMPEDIT, &c.

legal interest on that seems to be all he is entitled to.

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In quara impedit, the bishop pleaded no claim, but as Ordinary, judgment passed against C. for non appearance on a istengas. And an iffue between the plaintiff and incumbent on the right of presentation was tried, and a verdict found for plaintiff. Afterwards a writ of enquiry was awarded to enquire of the four usual matters. And by the inquisition, it was returned, that the vicarage was full of the defendant (incumbent) on the presentation of the king—that it began to be vacant 26th June 1746, on the death of J. R. clerk. and that the value by the year was 120%. On which return, laintiff moved for cofts, damages being given by the flat. Welm. 2. and by the flatute of Gloucester, costs are given in a cases where damages, and cited, 3 Lev. 35. Skinn. 25. On thewing cause the rule was discharged. The statute of Gloucester, 6 Edw. 1. relates to cases at common law, and houtes antecedent. The subsequent statute of Westm. 2. [13 Edw. 1.] created damages in quare impedit, where there were none before at common law, and gives two years value where the term is lost by disturbancy and lapse pendente lite; -if not, and the living full, then half a year's value. Vide Pinfeld's cafe. 10 Co. where the damages are created (none there no costs; where the damages are additional, there cotts, Sir T. Jones, 234. Keilway, 26. In quare impedit, the king has no damages, because he is not within the stat. i Westm. Hob. 23. If a writ of error is brought, and algment affirmed, then costs are given by the stat. Hen. 7. to costs in any other instance. Lomex v. Bp. of London. Gespin Clerk, and Coke. Barnes, 139.

If the incumbent, of which the church is full, was not party to the writ, he fhall never be removed. . Co. La.

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By the 3 Hen. 7. c. 10. [which gives coth upon writs of error brought if judgment be affirmed] If the defender

bring a writ of error, and the judgment be affirmed the

By virtue of this flatute, the court of King's Bench have

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BY the flatute 8 & 9 W. 3. c. 31. An act for the easier obtaining partition of lands in coparcenary, jointtenancy, and tenancy in common; after reciting, that Whereas the proceedings upon writs of partition between coparceners by the common law or custom, joint-tenants, and tenants in common, are found by experience to be et tedious, chargeable, and oftentimes ineffectual, by rea-" fon of the difficulty of discovering the persons and estates " of the tenants of the manors, meffuages, lands, tenements and hereditaments, to be divided, and the defective or dilatory executing and returning of the process of fummons, attachment, and diffress, and other impediments in making and establishing of partitions, by reason of which divers persons having undivided parts, or pur-" parts, are greatly oppressed and prejudiced, and the preec misses are trequently wasted and destroyed, or he uncul-" tivated and unmanured, so that the profits of the same " are totally, or in a great measure loft; for remedy whereof, it is enacted, That after process of pone, or attachment " returned upon a writ of partition, affidavit being made by any credible person of due notice given of the said writ of partition to the tenant or tenants to the action, and a copy thereof left with the occupier, or tenant or tenants; or, if they cannot be found, to the wife, fon or " daughter (being of the age of one and twenty years or upwards) of the tenant or tenants, or to the tenant in actual possession, by virtue of any estate of freehold, or of for term of years, or uncertain interest, or at will, of " the manors, lands, tenements or hereditaments, whereof the partition is demanded (unless the said tenant in actual possession be demanded in the action) at least forty days before the day of the return of the faid pone or attachment; if the tenant or tenants to fuch writ, or any of them, or the true tenant of the messuages, lands, tenements and hereditaments as aforefaid, shall not, in such case, within fifteen days after return of such writ of pone, or attachment, cause an appearance, to be entered in such a court where such writ of pone or attachment shall be re-"turnable; then, in default of fuch appearance, the de-" mandant having entered his declaration, the court may or proceed to examine the demandant's title, and quantity of " his part and purpart; and accordingly as they shall find " his right, part and purpart to be, they shall for so much " give judgment by default, and award a writ to make " partition, whereby fuch proportion, part and purpart, may be fet out feverally: which writ being executed after 1

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"eight days notice to the occupier, or tenant or tenants of the premisses, and returned, and thereupon final judgment entered, the same shall be good, and conclude all persons whatsoever after notice as aforesaid, whatever right or title they have, or may at any time claim to have, in any of the manors, &c. mentioned in the said judgment and writ of partition, although all persons concerned are not named in any of the proceedings, nor the title of the tenants truly set forth,"

By feet. 2. Provided, that if such tenant or other shall in one year after judgment entered, or in case of infancy, coverture, non-sanity, or absence, within a year after such inability determined, shew a good matter in bar of such partition, &c. the court may set aside such judgment; but if the same is confirmed, the party appealing pays costs.

By feet. 3. No plea in abatement shall be admitted or received in any suit of partition, nor shall the same be abated by reason of the death of any tenant,

By feet. 4. If the high sheriff cannot be present at the execution of the judgment in partition, the under-sheriff, in the presence of two justices, may proceed therein—And in case such partition be made, returned and filed, the tenants, before division, are to remain tenants, under the same conditions, and the landlords, &c. are to make good to their tenants the said parts as before partition made.

By fett. 5. The sheriffs, under-sheriffs, &c., are to give due attendance to the execution of the writ of partition, and in case the demandant does not pay the secs to the sheriff, &c. then the court shall award them, &c.

The above act was made perpetual by the 3 & 4 Ann. c. 18.

Note, By the common law joint tenants might agree to make partition of the lands, but one of them could not compel the others so to do; for as such estate is originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. Whereas by the common law, coparceners were compellable to make partition, if any one of them choice to sue out a writ of partition. But now by the statutes 31 Hen. 8. c. 1. and 32 Hen. 8. c. 32. joint tenants and tenants in common as well as coparceners, are compellable by writ of partition to divide their lands; and the above statute of 8 5 9 W. 3. has only provided an easier method of carrying on the proceedings by the writ of partition, than was used at the common law.

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#### Of the Writ of PARTITION, CC.

SINCE the above statute, partition has been usually made by writ; before which statute it was done either by writ, commission, or consent, and was in many cases liable to be defeated.

By the statute 31 Hen. 8. c. 1. joint-tenants, and tenants in common, or in right of their wives, are compellable by writ

to make partition.

To proceed to make partition, according to this statute, the demandant or demandants apply to the court of Chancery, and sue out an original writ, which is to this effect:

GEORGE the third, by the grace of God, of Great Britain, France, and Ireland, king, defender, of the faith, and to forth. To the Sheriff of - greeting: If M. B. and C. D. shall give you security, that their suit shall be profecuted, then fummon, by good fummoners, E. F. that he be before our justices at Westminster, on the morrow of All Souls, to shew wherefore, whereas the faid A. B. C. D. and E. F. hold together, and undivided, the manur with the appurtenances, and fourteen meffuares, - twelve cottages, fixteen barns, three dove-houses, four stables, thirteen gardens, two hundred acres of land, two hundred acres of meadow, two bundred acres of pasture, two bundred acres of wood, one hundred acres of furze and heath, two bun-dred acres of moor, one hundred acres of bushy ground, one bundred acres of marft, one bundred acres of broom, twenty edieres of land, covered with water, twenty pounds rent; common of pafture for all manner of tattles court-leet, courtsbaron, view of frank-pledge, profits and perquifites of court, free warren, free chace, free fishery, goods and chattels of felons, fugitives, outlaws, and those which are put in exigent, deedands, chattels waifed and estrayed, with the appureof which the faid E. F. demeth partition to be made between them according to the \* form of the statute in such case made and provided, and unjustly permitteth not the Tame to be done, and contrary to the form of the faid statute, as they say; and have you there the summoners, and this writ. Witness Ourself at Westminster, the day of \_\_\_\_ in the nineteenth year of our reign.

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Or "according to the custom of England" if parceners by custom.

#### Of the Writ of PARTITION, GC.

Upon this writ the Sheriff should summon the tenants, and non the return thereof, affidavit of the service of such writ hould be made according to the statute, to this effect:

A. B. and C. D. demandants, m sture Between and E. F. tenant.

I.M. and O. P. of - officers to the Sheriff of feverally make oath, and fay, that they the faid deponents did, on the ——— day of ———— in the year of our Lord, 1779, serve the above named E. F. tenant, with the writ of partition in this cause, by delivering to and leaving with the faid E. F. a copy of the faid writ, and acquainting him with the contents thereof; and these deponents did, on the faid \_\_\_\_ day of \_\_\_ in the faid year of our Lord, 1779, deliver to and leave with P. Q. R. S. T. V. &c. the occupiers of the mefluages, lands, and tenements, in the faid writ mentioned, a true copy of the fame writ. Called My San a to since and priore, whereas the 13 , now?

Upon default of appearance in court, the demandants should fue out a pone or attachment, which is to this effect;

GEORGE the third, &c. To the Sheriff of greeting : Put by furcties and fafe pledges, E. F. of that he be before our justices at Westminster in eight days of St. Hilary, to answer A. B. and C. D. wherefore the said A. B. C. D. and E. F. hold together and undivided the manor of with the appurtenances, &c. as in the writ] of which the faid E. F. denieth partition to be made between them according to the form of the statute instach case made and provided, and unjustly permitteth not the fame to be done; and to shew wherefore he was not in our court before our justices at Westminster, on the morrow of All Souls last past, as he was summoned, and have there the names of the pledges and this writ. Witness, & colders to mire! " end of probroces int at a viole

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This writ should be served in the same manner as the writ partition was, and the parties should be informed of the contents.

This pone should bear teste on the quarto die post of the return day of the writ of partition, and there must be fifteen days between the teste and return of it at least; and by the statute of 86 9 W. 3. ante, there must be at least forty days between the service of the writ of partition, and the return of the pone or attachment.

## Of the Declaration in PARTITION.

I F the tenant does not within fifteen days after the return of the pene or attachment cause an appearance to be entered, the demandant may enter his declaration, and the court will proceed to examine his title; and if they find the right with the demandant, there shall be judgment by default for so much, and a writ awarded to the Sheriff to make partition.

Or if the defendant appears, the plaintiff must declare,

The declaration is in the following form:

to wit, E. F. of \_\_\_\_ in the county aforefaid, was fummoned to answer A. B. and C. D. of a plea, wherefore, whereas the faid A. B. C. D. and the faid E. F. hold together and undivided, the manor of with the appurtenances, &c. [specify the premisses accord. ing to the writ of which the faid E. F. denieth partition to be made between them according to the form of the statute in such case made and provided, and unjustly permitteth not the same to be done, and contrary to the form of the flatute: And whereupon the faid A. B. and C. D. by their attorney, fay, that whereas they and the faid E. F. hold together and undivided the tenements aforefaid, with the appurtenances, whereof it belongs to the faid A.B. and C. D. and their heirs, to have one moiety of the tenements aforesaid, with the appurtenances, to hold them in feveralty, fo that the faid A. B. and C. D. of their moiety belonging to them of the tenements aforefaid, with the appurtenances; and the faid E. F. of his moiety belonging to him of the tenements aforefaid, with the appurtenances; may severally apportion themselves: He the said E. F. denieth partition thereof to be made between them according to the form of the flatute in fuch case made and provided, and unjustly permitteth not the fame to be done, and contrary to the form of the faid statute; whereupon they say, that they are injured, and have damage to the value of one hundred pounds. And therefore they bring fuit, &c.

The declaration by one parcener or joint-tenant against the others, must shew how they are joint-tenants. Cro. El. 64.

But not where they are tenants in common, for they claim by feveral titles, and one is not conusant of the others title. R.

Cro. El. 64.

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## Of the Declaration in PARTITION.

that it was the inheritance of the common ancestor in tail, is sufficient, without shewing how the estate tail is commenced,

But if the declaration fays that the plaintiff and defendant were seized in see, where it is found that the desendant has

only in tail, the writ abates. R. Cro. El. 760,

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to with E. F. of --- in the country aforefall was furnmoned to answer A. B. and C. D. of a ples wherefore, whereas the aid A. B. C. D. and the faid E. P he'd together and undivided, the manor of dich me appurtenances, tac. (specify the premises according to the vatal of which the taid E. F. dettern partition to be disade between them according to sine form of the Paties in fact said made and provided, and unjully permit teth not the fame to be done, and contrary to the form of the flatore. And whereupon the faid a, B, and C. D. by their attorney, any, that whereas they and the faid E. F. Wild regether and undivided the tenements aforefaid. with the appurtunances, whereof it belongs to the faid A.B.and their heirs, to have one moury of the tene. ments derelial, with the appartenances, to hold them in fever it, to that the faid A. B. and C. D. of their meins belonging to them of the concinents aforeigid, with the appurrenances; and the faid Li. F. of his minesty belonging to him of the tenements adordaid, with the appurtenances; may feverally apportion themselves . He the faid E. F, denieth partition shereor to be made between them according to the form of the flatte in such case made and provided, and unwilly permitter not the fame to og done, and contrary to the form of the faid flature; whereupon they tay, that they are injured, and have damage to the value of one hundred pounds. And encurious they bring

The declaration by one parcener or juint-tenant against the others, must show they are joint-tenents. On

10 the where they are to the in common, for they claim by titles, and one is not constant of the others titles. R.

## Of Pleading in PARTITION.

TO the declaration there can be no plea in abatement, fince the stat. 8 & 9 W. 3. c. 31. f. 3. Nor shall the write abate by the death of defendant. Ibid.

And if he pleads in bar, he can plead no other plea than non tenent insimul, for every other plea in bar is tantamount to non tenent insimul.

Upon which plea iffue may be taken, and the parties pro-

ceed to trial as in other cases.

But the party may confess the action, and consent that partition may be made.

In a writ of partition no damages shall be recovered, nor an enquiry of them. Noy 68. 143. for it is a real action.

Process having been duly returned, declaration entered, and no appearance entered by the tenant within fifteen days pursuant to the flatute 8 & 9 W. 3. The court, on motion, granted a rule to shew cause, which was afterwards made absolute, for the court to proceed to examine the title of the demandant, according to the statute. On the morrow the title was examined, and no counsel appearing for the tenant, judgment on default was given for the demandant to hold in severalty the premisses demanded in his count, in some of which he was feized of two undivided third parts; and in others of a moiety only with the tenant, the Earl of Thanet, And a writ of partition was awarded accordingly. Upon the return of the writ, the Sheriff returned that he had executed the same in the presence of persons who attended for plaintiff and defendant respectively; and he specified in his return the feveral parcels, with their metes and boundaries; and then plaintiff moved for final judgment, quod partitio for flabilis. And afterwards the writ was made absolute, on affidavit of notice to the defendant and tenants in possession. Halton v. Earl of Thanet. 2 Blacks. Rep. 1134. 1159. 1191 510001 111 does o loon, and error

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## Of the Judgment in PARTITION.

IN partition there are two judgments, the first quod partition fine; the second quod partitio firma, & stabilis in perpetuum teneatur.

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After confession of the action or issue tried for the plaintiff, there shall be judgment quod partitio siat. Co. Lit. 167. b.

And thereon a writ shall issue to the Sheriff to make

The first judgment quod partitio fiat is in the following form:

Therefore it is confidered, that partition be made thereof between them, &c. And it is commanded to the Sheriff, that in his proper person he go to the manor and tenements aforefaid, and in the prefence of the parties aforefaid, being forewarned, if they shall be willing, the manor and tenements aforesaid, with the appurtenances, by the oath of good and lawful men of his county, respect being had to the true value of the manor and tenements aforefaid, with the appurtenances, he cause to be divided into two equal parts, (or as the case is) and one part of those parts he cause to be delivered and affigned to the faid A. B. and C. D. and the other part thereof to the faid E. F. to be holden to them and their heirs in severalty, so that neither the said A. B. and C. D. nor the faid E. F. may have more of the manor and tenements aforefaid, with the appurtenances, than it belongeth to them to have; and that the faid A. B. and C. D. of their part to them thereof belonging; and the faid E. F. of his part to him thereof belonging, may severally apportion themkives; and that that portion, by the faid Sheriff so distinctly and openly made, he have here from the day of Easter in ffeen days, under his feal and the feals of those, &c.

Error does not lie on the judgment quod partitio fiat, nor is the record removed by it, because the writ of error comes too soon, and error does not lie till the final judgment quod

partitio firma & Stabilis, &c. 3 Salk. 145.

## Of the Writ DE PARTITIONE FACIENDA, &c.

UPON the foregoing judgment, the demandant shall have a writ de partitione facienda, which is to the following effect:

GEOREG the third, by the grace of God, of Great Britain, France, and Ireland, king, defender of the faith, and so forth. To the Sheriff of \_\_\_\_ greeting. Whereas E. F. late of \_\_\_\_ in your county, Esquire, was summoned to be in our court, before our justices at West minster, to answer A. B. and C. D. of a plea wherefore the faid A. B. and C. D. and the faid E. F. hold together and un. divided the manor of — with the appurtenances, [fpecify the premiffes according to the declaration] and the faid E. F. denied partition thereof to be made between them according to the form of the flatute in such case made and provided, and unjustly permitted not the same to be done, and contrary to the form of the fratute, as they faid; and the faid E. F. appearing in our faid court, freely confented that partition thereof might be made: Whereupon it was confidered in our fame court, before our justices at Westminster, that partition should be made between them of the manor and tenements aforefaid, with the appurtenances. Therefore we command you, that taking with you twelve free and lawful men of the neighbourhood of \_\_\_\_\_ aforefaid, by whom the truth of the matters may be better known, in your proper person you go to the manor and tenements aforefaid, with the appurtenances; and there, in the presence of the parties aforesaid, by you to be forewarned, if they shall be willing to be present, the fame manor and tenements, with the appurtenances, by the oath of the faid twelve free and lawful men, respect being had to the true value of the manor and tenements aforefaid, with the appurtenances, you cause to be divided into two equal parts, and one part of those parts to be delivered and affigned to the faid A. B. and C. D. and the other part thereof to the faid E. F. to be holden to them and their heirs in feveralty, fo that neither the faid A. B. and C. D. and the faid E. F. may have more of the manor and tenements aforefaid, with the appurtenances, than it belongs to

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elared and proceeded according to the statute, it should so be stated in this writ—So if defendant pleaded non tenent instant, and there was a verdict against him.

## Of the Writ DE PARTITIONE FACIENDA, &c.

them to have: And that the said A. B. and C. D. of their part to them thereof belonging, and the said E. F. of his part thereof to him belonging, may severally apportion themselves. And that that partition by you so distinctly and openly made, you have here from the day of Easter in sisteen days, under your seal and the seals of those by whose oath you shall have made that partition: And have you there the names of those by whose oath you shall have made the same partition, and this writ. Witness Sir William de Grey, knight, at Westminster, the \_\_\_\_\_\_ day of \_\_\_\_\_ in the twentieth year of our reign, &c.

Upon this writ, the Sheriff ought to give notice to the parties of executing the same—And he ought to attend in person. But by the state of William 3. ante, the under-theriff, or one who officiates as under-sheriff, may execute the same in the presence of two justices.

If the manor to be divided lies intermixt with other lands, bethat the jury do not know the limits, quantity, &c. of the trements to be divided; and the owner of the intermixt lands, &c. will not shew the certainty of his lands, yet the jury ought to make partition as well as they can. Dy. 266. a.

After the partition made, it must be returned to the court under the seals of the sheriff and the twelve jurors. Lit. sect.

The return of the above writ.

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AT which day here come as well the faid A. B. and C. D. as the faid E. F. by their attornies aforefaid. And the Sheriff, namely, John Thomas, Esquire, now here returns certain partition between the parties aforelaid, of the temements aforefaid, by the faid Sheriff, by virtue of the aforefaid writ, and according to the form thereof, by the oath of twelve free and lawful men of the neighbourhood aforesaid made: Which follows in these to wit, I John Thomas, Efg; Sheriff words, to wit of the county aforefaid, humbly certify and return to his majesty's justices, at the day and place in the writ here-tieth year of the reign of king George the third, of Great Britain, France, and Ireland, king, defender of the faith, and to forth, and in the year of our Lord, 1780, having taken with me O. P. Q. R. S. T. &c. twelve free and lawful men of my bailiwick, and of the neighbourhood in

## Of the Writ DE PARTITIONE FACIENDA, GC.

the faid writ mentioned, by whom the truth of the matter may the better be known, in my proper person did go to the manor and tenements in the faid writ specified; and there, by the oath of the faid jurors, in the prefence of the parties in the faid writ named, by me forewarned accord ing to the command of the faid writ, and by their affeit. the faid manor and tenements, with their appurtenances, (respect being had to the true value of the same) I did cause to be divided into two equal parts, and one part thereof, that is to fay, all those two meffuages, two barns, and the land thereto belonging, called the - containing two hundred and twenty acres, two roods, and feven perchis. more or less, late in the occupation of William Jones, and now of Michael Dixon and his affigns, and all that melfuage, &c. [specifying in like manner the whole apportionment allotted to the demandants]; and all commons, common of pasture, woods, under-woods, and trees, ways, waters, ealements, and appurtenances, to the faid feveral melluages, cottages, farms, lands, wood, ground, and premises belonging or appertaining, or therewith used and enjoyed; all which faid premiffes are fituate, lying, and being in - in my faid county; and did cause to be delivered and affigued to the faid A. B. and C. D. in the faid writ named; and the other part thereof, that is to fay, all the manor of ——— in the faid county of with the court baron of the same; and all rights, royalties, members, and appurtenances thereof; and all that barn, farm, and lands, &c. &c. [specifying the whole apportionment allotted to the defendant]. All which faid meffuages, cottages, farms, barns, lands, woods, grounds, and premisses, are situate, lying, and being in the parish of in my county, I did cause to be delivered and affigned to the faid E. F. Efq; in the faid writ named, to be holden to them and their heirs in feveralty, as by the faid writ I am commanded; so that neither the said A. B. and C. D. nor the faid E. F. might have more of the manor and tenements aforefaid, with the appurtenances, than it belonged to them to have; and that the faid A. B. and C. D. of their part to them thereof belonging, and the faid E. F. of his part to him thereof belonging, may feverally apportion themselves.

In witness whereof as well I the said Sheriff, as the jurors aforesaid, to this indented partition, have set our seals the day and year and place above mentioned.

John Thomas, Esq; Sheriff.

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## Of the final Judgment in PARTITION.

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JPON the foregoing return to the writ de partitione facienda, the final judgment of the court is, "Therefore it is considered, that the aforesaid partition be holden firm and effectual for ever, &c." And therefore this judgment, when made by writ after the appearance of the party, shall not be descated. Co. Lit. 168. b. 171. a.— even though made against a feme covert—Ibid.—or though not equal—lid.—or though not equal, and any one of the parties be an infant. Ibid.

And so by the ftat. 8 & 9 W. 3. c. 31. If made without the appearance of the tenant, if he does not appear within inteen days after the return of the attachment, where an affidavit was made of notice to the tenant forty days before the return of the writ, and a copy of it left with the occupier of the land.

But by the same statute, if judgment be in a writ of partition, without the appearance of the desendant, upon motion shewing a probable bar, or that the demandant hath not title to so much, within a year after judgment, or (if the party was an infant, covert, nonsane, or out of the realm after the inability is removed,) the court may order the desendant to plead, Sr.

Or if the demandant's title be admitted, but the partition appears unequal, the court may award a new Partition.

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with the court baron of the lame; and all rights, royalrie members, and appurentness thereof; and all that barn faim, and lands, St. Co. [pecifying the whole appor tionment alietted to the detendant]. All which faid met funges, cottages, farms, barns, lands, woods, groundand premifies, are fituate, lying, and being in the parish of -- in my county, I did cause to be delivered and affigued to the faid E. F. Fig. in the faid writ named, w be holden to them and their heirs in feveralty, as by the faid writ I am commanded, so that neither the faid A. b and ( D, nor the faid E E might have more of the manor and tenements aforefaid, with the appurtenances than it belonged to them to have; and that the faid A. b D. of their part to them thereof belonging, and the faid L. P. of his part to him thereof belonging, ma teverally apportion themlelves.

ing nets shereof as well I the faid Sheriff, as the jurer aborelast, to this indented partition, have fet our feals to day and year and place above mentioned.

WASTE is the committing any spoil or destruction in houses, lands, &c. by tenants, to the damage of the heir or him, in reversion or remainder: whereupon the writ or action of waste is brought for recovery of the thing wasted, and damages for the waste done.

The flat. 52 Hen. 3. c. 22. f. 2. enacts, "That farmers during their terms shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to farm; unless they have fpecial licence by writing or covenant, mentioning that they may do it. Which thing if they do, and thereof be convicted, they shall yield full damages, and shall be amerced grievously."

For an exposition of this statute, vide Bac. Abr. 5 Vol. 460. Waste may be committed, not only in houses and lands, but in gardens, orchards, timber-trees, dove-houses, warrens, parks, fish-ponds, and other subjects of property.

There are two kinds of waste, viz. voluntary or actual, and negligent or permissive. Voluntary may be done by actual pulling down or prostrating houses, or cutting down timber trees; negligent, by suffering houses to be uncovered, whereby the timber and spars are rotted.

The persons who may be injured by waste, are such as have some interest in the estate wasted; as a remainder man, or reversioner. What shall be deemed waste, and what not, vide Bac. Abr. 461. &c. and Com. dig. 5 Vol. 638. &c. and vide ibidem, by whom, and against whom, waste lies.

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## Of Remedy in WASTE.

THE redress for the injury of waste, is of two kinds, theventive and corrective: the former of which is by write

of effrepement; the latter by that of Waste.

The writ of estrepement was a remedy at common law, after judgment obtained in any action real, and before position was delivered by the sheriff, to stop any waste which the vanquished party might be tempted to commit in an estate, which was determined to be no longer his.

The stat. of Gloucester gave the writ of estrepement also, sindente placito, to inhibit the tenant from doing waste till

the fuit was determined.

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Besides this preventive writ at common law, the courts of equity, upon bill exhibited therein, complaining of waste and destruction, will grant an injunction, in order to stay waste until desendant shall have put in his answer, and the court shall make further order; which is now become the

usual way of preventing waste.

Besides the above methods to prevent waste, there is an action of waste, partly sounded at common law, and partly upon the stat. of Gloucester, 6 Edw. 1. c. 5. by which "a "man may have a writ of waste in Chancery against a man "who holds by the law of England, or in other manner, for term of life, or years, or in dower; and he who shall "be attainted of waste, shall lose the thing which he has "wasted, and make a satisfaction of treble of what the waste "shall be taxed at."

This statute gave a writ of waste, but before it, by the stat. of Marl. 52 Hen. 3. a writ of prohibition was given

for waste.

After which statutes, the statute Westm. 2. 13 Edw. 1. 4.14. enacted, "That of all manner of waste done to the "damage of any person, there shall henceforth be no writ " of prohibition awarded, but a writ of summons; so that "he, of whom complaint is, shall answer for waste done at any time. And if he come not after the fummons, he " shall be attached; and after the attachment, he shall " be diffrained. And if he come not after the diffres, "the sheriff shall be commanded, that in proper person, "he shall take with him twelve, &c. and shall go to the place wasted, and shall inquire of the waste done, and " shall return an inquest; and after the inquest returned, they shall pass unto judgment, like as it is contained in " the stat. of Gloucester." VOL. II. And

## Of Remedy in WASTE,

And by c, 22. of same statute, The action of waste is maintainable by one tenant in common against another.—The equity of which, extends also to joint tenants, but not to coparceners; because they might make partition, and so prevent wafte.

The action of Waste, is a mixed action; partly real, in far as it recovers land, &c. and partly personal, so far as it Tecovers damages, even their of a cheeft side of section and

e king to the thought of -- if A. half make you fecure.

Art, then Carement, by good himm needs, B. who was the

wife of C, that the his before our justifies at Weilmindler, on, &c. to thew whatelook the hard committed walls,

ale, dettruction, and banifiment of lands, houses, woods,

graeus, &c. which the holds in cower, of the inheritance

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England, there is shall another than if for any perion to

commit write, lare, or derivaction of lands, houses, woods, or gardens, they hime it shall committed water &c. of

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For other forms, side Flagson or Norma Breaum, &G.

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#### Of Process in WASTE.

THE process incident to an action of waste is a fummons on the original, which the cursitor will make out from a

If it is against tenant in dower, or guardian, it does not reite the statute; but if it is against tenant for life, or years,

by the curtefy, it does.

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The writ is to this effect, if against tenant in dower:

The king to the sheriff of —— If A. shall make you secure, &c. then summon, by good summoners, B. who was the wife of C. that she be before our justices at Westminster, on, &c. to shew wherefore she bath committed waste, sale, destruction, and banishment of lands, houses, woods, gardens, &c. which she holds in dower, of the inheritance of the aforesaid A. in —— to the disherison, &c.

If against tenant for life or years, it is to this effect:

The king to the sheriff of —— If A. shall make you secure, &c. then summon, &c. B. &c. Wherefore seeing that it is provided by the common council of our realm of England, that it shall not be lawful for any person to commit waste, sale, or destruction of lands, houses, woods, or gardens, the same B. hath committed waste, &c. of the lands, houses, woods, and gardens in L. which the aforesaid A. demised to him, &c.

For other forms, vide Fitzherbert's Natura Brevium, &c. If waste is brought by the bishop, or ecclesiastical person, writ concludes ad exhæredationem episcopi vel ecclesiæ.

On the return of the fummons, the defendant may effoign

nd the plaintiff adjourn, &c.

In waste, fummons and severance lies, for the writ is ad

theridationem, and it is a plea real. 2 Instit. 307.

If the tenant does not appear at the return of the fummons, then plaintiff applies to the filazer of the county, for a pone attachment, which is to the same effect; only "commanding the sheriff if A. shall make him secure, to put B. by sign gages and pledges, &c." On return of which, the plaintiff may apply for a distringuis, commanding the sheriff to distain, the tenant to appear, &c.

If the tenant appears, the plaintiff declares against him,

If the tenant appears, the plaintiff declares against him, and the tenant pleads, or lets judgment pass by default.—
The tenant does not appear, a writ of enquiry goes to the beniff; and on return thereof, plaintiff has judgment: of

thich, vide post, Title Judgment in Waste.

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#### Of Process in WASTE!

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In waite against two by the bishop ad exhareditionem & clesia, and process continued till the grand distress returned one came and the other made default; and he who appeared was compelled to answer alone, for the process is determined

against the other. Br. Waste. pl. 99.

When the summons is served upon the tenant, or upon the land, fourteen days before the return thereof, proclamatin must be made of the summons on a Sunday, at or near the most usual door of the church or chapel, of the town of parish where the lands lie; and that proclamation must be geturned, together with the names of the fummoners, pur fuant to the 31 of Eliz, c. 4, on her and a come of stayon If he has the severflung he shall by the defrodant bulls of him.

Otherwise, it he in remainder brings made or in the defeat
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The declaration also must be conformable backing write for

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Contract Assessment off I

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### Of the Count in WASTE.

THE plaintiff must charge the defendant in the tenet of tenuit, for there is no other form. Crox El. 356.

And must charge him as affignee, executor, &c. or ac-

cording to defendant's tenure.

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And the count must shew how plaintiff is entitled to the heritance—as, if rector he must shew that he is so. If he counts upon a lease by himself, he must shew his seisin in see and demile to defendant.—If upon a lease from his ancestor, must thew feifin, a demise to defendant and descent to himelf.—If he claims by fine, he must shew it, and the uses of it. hoif by common recovery—So if by grant of the reversion So if he and defendant are joint tenants; he must shew that they are so So if he and the wife sue in right of the wife-I he has the reversion, he shall say the defendant holds of him -Otherwise, if he in remainder brings waste-or if the lord welcheat does, for there is no tenure of him. Hutt. 110.

The declaration also must be conformable to the writ, for if the writ is for waste in land, and it is assigned in cutting

wood, it is bad.

So if the writ is for waste in three villes, and the declara-

tion is for waste in one or in another ville.

The declaration must also particularize the quality and quantity of the waste; as if it is in cutting trees, it must shew the number of the trees-If in houses, he must shew the

And must conclude if to his own disherison, ad exhareda-

tionem of the plaintiff.

If of lands whereof he is seized in right of his wife, ad ex-

beredationem of the wife.

And if by a bishop, &c. it must conclude ad exharedationens nciefia. 2 Roll. 832. 1. 30.

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## Of Pleading and View in WASTE.

DEFENDANT in waste may plead in abatement of plaintist's title; as if he intitles himself to the reversion in fee, defendant may snew a device to him in tail. Link.

As to pleas in bar, defendant may plead no waste done, which is the general issue, and this admits nothing, but puts the whole declaration in issue. Lutw. 1547.—Or he may plead a release: or to waste in the tenuit, accord and satisfar-

tion. Croll. 357. 101 VIII

So defendant may justify, that he took for repairs;—so that he took for necessary boses—or that the trees were arithe mortue, and neither bore fruit or soliage—or that the lease was without impeachment of waste.—Or, he may plead no demise to him—or that a mesne remainder man is affer.

Or, he may plead in excuse, qued reparavit before action brought, or that he rebuilt, and has fince kept in repair.—
Or, that the premisses were so ruinous at the commencement of his lease, that he could not repair. Mo. 54.

After issues joined, the venire facias recites the issues, and commands the Sheriff that he cause to some twelve, &c. to enquire if the defendant bath committed waste as plaintiff alledges. Cro.

Car. 281.

In waste, if issue is joined, the jury ought to have a view of the place or places wasted, otherwise trial shall be stayed; and six at least must have a view. 2 Saund. 254. And the venire facias must be that the jury shall have view.

So, if there is judgment for want of appearance to the distringus, there must be a view and inquisition taken, as well as upon issue joined. R. Ow. 12. For the law will not suffer so heavy a judgment as the forseiture of the thing or place wasted, and treble damages to be passed upon a mere default, without sull assurance that the sact is according as it is stated in the writ.

But upon default made after appearance and plea, there shall be no enquiry of waste, for this case is not within the purview of the statute Westm. 2. 2 Instit. 390. but enquiry

of the damages only.

Nor shall there be enquiry of the waste, upon a judgment by confession, nil dicit, or non sum informatus, but enquiry of the damages only: for the waste is confessed. Cro. El. 18. Hutt. 44.

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#### Of Judgment in WASTE

By the statute of Gloucester, plaintiff, in an action of waste

If the judgment is against the desendant in the tenet, then it shall be for the place, and the treble damages found by the inquest.

But if it is against him in the tenuit, judgment shall be for

the damages only.

If waste be assigned in three houses, two gardens, &c. the jury ought to find damages severally for every of them; for if it be but of small value for any of them, the court will not adjudge it waste as to that part: but if the jury gives entire damages, it shall not be intended that there were petit damages in any, and therefore the verdict will be good. Cro. Car.

If verdict is for defendant, the judgment shall be quod quærms nil capiat, &c. and desendant eat inde sine die. 2 Saund.

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And if the defendant will not pray judgment to avoid a writ of error, it may be entered upon the prayer of the plain-

tiff against himself. 2 Saund. 253.

If plaintiff recovers upon the tenet, he has a writ of feising for the place wasted, provided the particular estate be still subsisting: (for if it be expired, there can be no forfeiture of the sand) and the damages are to be recovered in the same manner as all other damages, by ca. sa. fa.—fi. fa.—or elegit.

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alphanese, there must be a view and inquilition caken, a well as onen iffice forced. IC thus year or the fact will not

further to heave a judgment as the ferfeiture of the thing of

place wested, and trook-slave see to be passed upon a mere de-

fault, without full affigrance that the fact is according us if

But open default made after appearance and plear there

Now that there be enquiry of the pure, upon a judgment

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the damages only: for the teaffe is confelled. Gos. El 19

fixell be no enquiry of giant, for this cale is not within the

of the damages only,

the owner gazen must be shot, the pary find bave view.

DOWE Risting part of the hufband's effate which comes to the wife after the death of the hufband—that is, the actual wife of the party at the time of his decease: so, thas if the has been divorced a vinculo matrimonii, slie is not entitled to dower.—But if she were divorced a mensa at there only, though it were for adultery, by the common law she should have her dower: yet now by stat. Westm. 2. If a woman clopes from her husband and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled.

Widows of traiters are barred of dower, by stat. 5 & 6 Edw. 6. c. 11. (except in certain treasons relating to the coin) but not the widows of felons.

An alien widow of a subject cannot be endowed.

And to be entitled to dower, the wife must be above nine

The wife, by law, is entitled to be endowed of all lands and tenements, of which her hufband was feized of in file Jimple at any time, during coverture, or in fee tail general, or as heir in feecial tail, and of which any iffue, which the might have had, might by possibility have been heir.

And the shall be endowed, as well of lands, &c. where the husband had a feifin in low, as an actual feifin. Co. Lit. 31. a.

And a widow shall be endowed of all her husband's lands, tenements and hereditaments, corporeal or incorporeal, unless there be a special reason to the contrary: for of a castle built for desence of the realm she shall not be endowed, nor of a common without stant—Nor of a copyhold estate, unless by the custom of the manor: and then it is not called dower, but her free bench.

Where dower is allowable, it matters not, though he aliens the land during coverture; for he aliens it liable to dower.

them - And the latter hoppens, when after affigurent, the

dowager aliens the land afligned her for dower; in which cale

the fortests her dower this facts, and the heir may recover it

Nate. There are three things requilite for the confimmation of dower zera. Marriage, leifur, and the death of the

dad notes. A woman entitled to dower cannot enter till in

he affigured to her, and fer out either by the beir, terre-tendus

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THERE were five species of dower, four of which are now subfillings

Dawer de la pluis beale, which was abolished with the

pecies subsisting.

more than a third, or the whole, or only a quarter of her bulband's lands.

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5. Dower ex affensu patris, which is only a species of the

Dower ought to be affigned to the widow within forty day after her husband's death; and by law she has the privilege of staying in the capital mansion, or some house whereof she is dowable, for forty days after her husband's death, (the day of his death being accounted one) which is called the widow's quarentine; during which time, she is to be supplied with all accessaries at the expence of the heir; and before the end thereof, is to have her dower assigned her: and this privilege is confirmed by Magna Charta, c. 7.

Tenancy in dower, or an action for dower, feldom happens at this day, dower being generally barred by a jointure (as regulated by the stat. of uses, 27 Hen. 8. c. 10.) made upon preconcerted marriages, or where the estate is conside-

A widow may prevent her dower, or forfeit the same by her own act; the first case happens, when she detains the charters or title deeds and evidences of the estate from the heir; in which case she is not entitled to dower till she restores them.—And the latter happens, when after assignment, the dowager aliens the land assigned her for dower; in which case she forfeits her dower ipso facto, and the heir may recover it by action by the state of Gloucester.

Note, There are three things requisite for the consummation of dower; viz. Marriage, seisin, and the death of the husband.

And note, A woman entitled to dower cannot enter till it be affigned to her, and set out either by the heir, terre-tenant or Sheriff (after recovery thereof by action) in certainty. Roll. Abr. 681. Dy. 346. Plow. 549. Brook. 18. Co. Lit. 34. a. 37. e, b.

#### Of the Process in Dower.

If the heir or his guardian do not affign the widow her dower within the term of quarentine, or do affign it unfairly, she has her remedy at law, and the Sheriff is appointed to affign it. Co. Lit. 34. Or if the heir (being under age) or his guardian affign more than she ought to have, it may be afterwards remedied by writ of admeasurement of dower.

Dower may be recovered by writ of dower unde nil babet, or by writ of right of Dower.—The latter is proper when the wife has dower of part in the same ville: for then she cannot have a dower unde nil babet, against the same tenant.—Vide

Com. dig. tit. dower.

The writ of dower unde nil habet may be fued in the Common Pleas, or in the county by justicies, or upon a special custom by plaint: but it is usually commenced in the Common Picas.

A pracipe must be made out for the original writ, which is

in the following form:

Berkshire, to wit. Command E. F. that justly, &c. he render to Ann B. widow, who was the wife of John B. her reasonable dower, which falleth to her out of the freehold which was of the said John B. heretofore her husband, in the parishes of O. P. Q. & R. whereof she nothing hath, as she says.

Returnable in eight days of the purification of the bleffed DAT

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For forms of the original writ, Vide the books of entries,

The writ was, command B. that he render A. her reasonable dower of lands, &c. late of C. her husband: and because the writ did not say, command B. that he render A. who was the wife of C. &c. the writ was held ill. Cro. Car. 217.

When the original writ is obtained, the process upon it is a fummons, which is to be served upon the tenant or upon the land: after which, sourteen days before the return thereof, proclamation must be made of that summons on a Sunday, at or near the most usual door of the church or chapel of the town or parish where the lands lie; and that proclamation must be returned, together with the names of the summoners; pursuant to 31 Eliz. c. 4. for without it no grand cape can be awarded, but an alias and pluries summons.

#### Of the Process in Dower.

The proclamation, by the stat. 31 Eliz. ought to be made at the parish church door, though it be in another county than where the land lies. Cro. El. 472.

At the return of the fummons, defendant may cast an

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If the tenant casts an effoign, at the return of the fummons, it must be entered upon the effoign day of the same return.

And if no essoign be then entered upon the day of exceptions, the defendant may enter a ne recipiatur.

The return by the Sheriff is in this form:

Pledges of profecuting { John Doe, Richard Roe.

Summoners of the within named W.W. Efq; Sheriff, E.F. R. S. and T. W.

Upon the return of the summons, if the tenant does not appear, or cast an essoign—or if an essoign is cast, and at the day given by adjournment of the essoign, the tenant does not appear, the next process is the writ of grand cape.—But then, before the grand cape issues, the demandant shall make her demand, for no certainty appears before the demand made. Brook. 96.

The writ of grand cape commands the Sheriff to seize the third part of the lands, &c. demanded; or, if the same are savel-kind, to seize the moiety, &c. by the view of two honest and lawful men of the county, and to summon the tenant, &c.

For the form of the writ, vide the books.

If the Sheriff does not return the writ, an alias grand cape goes, at the return of the grand cape: and if the tenant alledges, that he was not able to come, it does not fave his default. R. 3. Leon. 2.

So if nulla tenementa, &c. be returned, a testatum grand cape issues.

If

DOWER.

#### Of the Process in Dows

If the Sheriff executes the writ, the return is in this form,

Summoners of the within named W. W. Efq; Sheriff.

If the tenant appears, he may wage his law of non-summons, &c.—If he does not wage his law, there shall be final judgment against him.—Vide Com. dig. 5 vol. 240. and the Introduction to the first vol. of this work, for an explanation

of this practice.

In dower of lands in L. M. and N. the Sheriff returns pledges of profecuting A. B. C. D. and the names of the summoners E. F. G. H. and that after the summons made, and sourcen days and more before the return of it, at the most usual church door of L. where part of the lands lay, such a Sunday after sermon ended, be publickly proclaimed, all and singular the things contained in the writ, to be proclaimed according to the sorm of the statute in that case made, and indersed his name to the return. To which an exception was taken, because proclamation was not made at all the church doors; but per cur, proclamation at any one of them is sufficient—but the return was held ill; because, he says, he had proclaimed all and singular the things in that writ contained, without saying what. Hob. 133.

Motion was made to fet afide the grand cape, proclamation not having been made fourteen days before the return of the fummons according to the 31 of El. the summons was returnable on the Morrow of Ail Souls, and the proclamation was made the 27th October, which was but six days before the return. The court made a rule to shew cause, which was afterwards made absolute, no cause being shewn. Barnes, 1.

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# Of Appearing, Counting, &c. in Dower.

IF the tenant appears upon the fummons, &c. he may vouch the heir to warranty.

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Or if the tenant appears upon the fummons, or on the adjournment of the effoign, or if he appears at the return of the grand cape, and the defendant releases the default, the lemandant shall count upon her writ. Co. Ent. 171. a.

The count shall be of a third part of such a messuage, &c. for if it be of three messuages, &c. where there are several; and three is the third part of all, it it bad. 3 Lev. 169.—But quære, if it cannot be amended? vide ibidem.

If dower is demanded of lands of the nature of Gavelkind, it must be of a moiety dum fola et casta; for if the plaintiff demands a third part, it is a good bar that the land is Gavelind. I Leon. 133.

The count must describe the lands so certain, that seisin may be given by the sherist, and therefore of a third part of three tenements is bad. 2 Mod. 355.

Dower does not lie de tenemento, being too indefinite. La. Raym. 1384.

If the demandant is not named, as quæ fuit uxor B. in the first part of the writ, it is bad; though afterwards, the lands demanded are called terras B. quondam viri fui. Cro. Fac. 217.

The tenant, after appearing to the grand cape, returnable the third return of term, obtained a rule, on motion, to shew cause why he should not have an imparlance, which, at hearing, was discharged. Et per cur. In dower unde nil babet, or any other real action, an imparlance is not to be given: essigns are a sufficient delay. Real actions are not within any of the rules of court concerning imparlances. Barnes, 2.

Motion was made to let clide the grand cape, proclams toon as having been insale fourteet days before the return of

the james according to the 31 of El. the lummons was re-

targable on the Morene of All Souls, and the proclamation was

made the areh Calabers which was but fix days before the

return. The court made a rule to thew caufe, which wa

afterwards made absolute halcaule being thewn. Baruck b.

#### Of demanding a View in Dower.

WHEN the demandant has counted, the tenant may demand a view of the lands demanded. Co. Ent. 177. a. Or if dower is demanded of a rent, he may demand view of the land out of which it issues.

By flat. West. 2. 13 Edw. 1. c. 48. The tenant shall not have a view, if the husband of the demandant aliened to the tenant himself. 2 Instit. 481. 3 Lev. 169.—Or if the husband died seized—Or if a prior writ of the demandant abated by a plea, which arose upon the view. And if the tenant demands a view when it is not allowable, the demandant may counterplead; as if the demandant's husband died seized. Clift. 299. Rast. 231. 3 Lev. 168.

The counter plea in such case, prays, that the view may be excluded. Vide more of the view in Dower, and what pleas may be had after. Com. dig. 5 Vol. 251. (and tit.

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The return was afterwards amended; and the fact certified

affects of the evidence, and glained had judgment. Barnerin.

On the plea of me wegner arrangle, and iffur thereupon, a mit was awarded to the billion; who carried that the was

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## Of Pleading in Dower.

THERE are some pleas which may be pleaded in abatement, as ancient demessive.—That the demandant took shand pending the writ—that her husband was attaint—that the holds jointly with A not named.

As to pleas in bar, there are some which admit the de-

mand, others which deny it.

Of the furst fort are the pleas of tout temps prist, and if this is pleaded on the first day of the return of the summons, it will excuse damages. Co. Lit. 32. b.

So the heir may plead detainment of charters and tout temps prist si, &c. Rast. 224. b. or detinue of charters as to

parcel. Sal. 100

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Those pleas which deny the right, are ne unques seiste que toure—That demandant was under age dowable—that the husband of demandant is alive—an elopement by demandant during coverture—or a divorce a vinculo matrimonii—or that demandant had a jointure—or that the husband, or husband and wife, levied a fine, and demandant made no claim within five years—or that the husband suffered a recovery—or tenant may plead, that lands were assigned for dower by the heir, &c.—that there was a demise for years before coverture, rendering rent, and pray, that demandant may be endowed of the reversion and rent—or that demandant has released her dower to the tenant of the freehold—or ne unques accouple in lawful matrimony: upon which plea, a writ goes to the hishop for his certificate of the marriage.

For pleas, and the replication to pleas, vide Com. dig.

Bac. Abr. &c.

An iffue was joined upon ne unques accouple, &c. and a writ awarded to the bishop; he returned the evidence before him to prove the marriage, which appeared sufficient, but did not positively return, that the parties were lawfully married. Plaintiff moved for judgment upon the return, but the court refused it, allowing plaintiff to move again; giving notice of the motion, that the other side might have an opportunity of disputing the sufficiency of the return.—
The return was afterwards amended, and the fact certified instead of the evidence, and plaintiff had judgment. Barnes, 1.

On the plea of ne unques accouple, and issue thereupon, a writ was awarded to the bishop; who certified that she was accoupled in vero matrimonio cum prædict. B. sed clandestino et quod B. & E. (demandant) thori et mensæ participatione mutuo cohabitaverunt usque ad mortem predict. B. and judgmen.

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# Of Pleading in Dowek!

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was thereupon given for the demandant. On which, error was brought, and inter air it was affigued, that there was neither day or place of the marriage mentioned in the certificate; but the court held it not material or illuable, because the certificate from the bishop is conclusive. That the certificate is not good, because it did not answer to the words of the issue, " Ne unques accouple in loyal matrimonie ;" for that it was a true matrimony, and that they lived together at bed and board, is but argumentative that they were legitime matrimonie copulati; but the court difallowed this exception also: for vero matrimonio, though clandestino copulati faerunt, is as good as legitimo matrimonii, and have all one intendment; and though it be clandestine, yet it doth not vitiate the marriage and when it is added, that there et mensa participatione cobabitaverunt, &c., this proves they continued as husband and wife during his life, and therefore it is not to be questioned now. Judgment affirmed, Cr. Jac. 351. Brook, 54. Dyer, 313. Co. Lit. 33. 9 Co. 19. graph of the man winds with an angle of high of

is many thought into any angles us fining, reveal up giller that a see was bille are in but his businesses many

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## Of Judgment in Dower:

#### 1. Of Judgment by Default.

F the tenant appears and makes default in the fame term, there shall be final judgment against him. 2 Saund. 46.

Or if he confesses the action, or nil dicit, or non fum in-

formatus, there shall be judgment thereon.

But if the tenant makes default in another term, a petit cape shall iffue. 2 Saund. 46.—And if he cannot fave his default upon the petit cape, there shall be final judgment against

So if the tenant pleads that the husband is alive, and the demandant, at the day for trial, is ready with her proofs there shall be final judgment against the tenant if he makes detault. 2 Inftit. 80.

If the demandant is not present with her proofs, there shall

be a petit cape awarded.

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So if the tenant makes default at the trial by jury, there hall be a petit cape against him; and if he does not fave his default, there shall be final judgment against him.

So there shall be judgment by default, though the tenant

is an infant. Cro. Fac. 111.

In dower against an infant, he made default upon the grand cape returned: and it was held per tot cur. that judgment shall be given upon the default; for the infant shall not have his age in dower, which being but for life, demandant may be totally defeated by his frequent defaults—though some of the books say, that if judgment be given upon the grand cape before appearance, this is error: fecus, if he appears by guardian, and after loseth by default; for then, if any default be in the guardian, he shall recover against him in a writ of disceit; but other books doubt if the infant shall not have his age in dower: however, the other feems the more reasonable opinion: Cro. Jac. 111. 392. &c. vide Moor, 1148, &c.

On error to reverse a judgment in dower, at the grand lessions in Wales, it appeared by the record, that the tenant appeared at the return of the fummins, and day was given over; and then came by attorney, and said nothing in bar. Whereupon it was considered, that the third part of the lands oforesaid; should be taken into the hands of our lord the king; and upon day given ad aud. judicium, judgment was given, that the demandant do recover. The error affigned was, that they ought not to have awarded a petit cape, because as defendant appeared, they ought to have given judgment on the nil dicit; for the petit cape is always upon defaut after appear-

## Of Judgment in Dower.

1. Of Judgment by Default.

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appearance, and is only to answer the default, as the grand cape is before appearance, to answer the default and demand. But this was held to be no error, being only an awarding of more process than was necessary, and it was of advantage to the tenant by delaying the demandant. And, per Twyfden, if erroneous, they might now give judgment upon the nil

dicit in this court. Vent. 60. 2 Saund. 46. 50. 2 Keeb. 450, 8... In dower, the tenant at the day of taking the inquest, after the jury had appeared, and before they were fworn, made default, and a petit cape was awarded; and the tenant at the day in banco informed the court, that he was but tenant for life, and the reversion in one A. who at the day in banco ought to be received; and the court appointed him to plead his plea at the return of the petit cape, before which time his appearance feems idle. Brownl. 126.

Note, The demandant upon judgment by default, after a grand cape, shall have no damages upon the inquisition found, if there was no notice of executing the writ of enquiry. 3 Lev. 409.

me of the inquilition, unlets the were in possiblion before by

fon a writ of enquiry, the jury may give her dame

vitue of an execution awarded upon the judgment by default The jury may affels dainages beyond the revenue, for the may ave fustained more. I freen 55 Damages in dower, by the flat of Merton, extends only olands, whereof the hulband died felded; and therefore if e jury do not find that he died feized, judgment for datages will be reverted. They mult find too, of what effact tedied feized, viz. an effate in fee, or in tail, for it the hufand alien, and take back an effate for life, the wife thall re-

over dower, but no damages. If the jury find the husband died forzed, they mult find the mewhen, the annual-value of the land, damages on account the detention and coffs; but litthey find the nufband was raed, but did not die fo, then no cofts of damages, but only tevalue of the land, for damages are only given by that af linum, where he died feized; and the flat. if Giouceller gives olls only where plaintiff recovers damages. 2 Sannal 33. The reason why the jury are to find the value of the land

refer the hisband died seized, is, that the court may give respond 10 vs pursuant to the sente of therson, from the death of duch schulband, to the time of the judgment. And if the beir, to the ill is to I S, and the widow recovers her dower against him, thus whole suche organ, from the death of the flums that the whole suche organ, from the death of the bulband;

# Of Judgment in Dower.

2. Of final Judgment, Writ of Enquiry, Seifin, &c.

THE final judgment in Dower is, quod quarens recupered seissinam de tertia parte tenementor : petit'; or if it be of gavel kind lands; quod recuperet feisinam de dimidio, &c.

And by the flat. of Merton, 20 Hen. 3. c. 1. Si recuperaverit tenementa de quibus vir obilt seisitus, tenens reddat damna, viz. valorem dotis à tempore mortis viri usque ad diem, quo per

judicium curiæ, seismam suam recuperaverit. And therefore after judgment for feifin, and babere facias fusinam awarded, if the demandant makes a suggestion upon the roll, that her husband died seized; there shall be a writ to

enquire what damages. 1 Lev. 38. Clift. 302.

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And upon return of the inquisition; there shall be judgment and recuperet valorem, and her damages. Or the jury who try the issue may also enquire of the value and damages. Or the demandant may remit the value and damages, and have an habere feifinam immediately. Town, Jud. 100.

Though the flat. fays only, that she shall recover damages to the time of the judgment; yet if the obtain judgment by default; upon a writ of enquiry, the jury may give her damages to the time of the inquisition, unless she were in possession before by virtue of an execution awarded upon the judgment by default. The jury may affess damages beyond the revenue, for the may ave fustained more: 1 Leon .. 56.

Damages in dower, by the flat. of Merton, extends only blands, whereof the husband died selzed; and therefore if he jury do not find that he died seized, judgment for damages will be reverfed. They must find too, of what estate and alien, and take back an estate for life, the wise shall re-tover dower, but no damages.

If the jury find the husband died feized, they must find the in the jury and the hulband died leized, they must and the wall in when, the annual value of the land, damages on account of the detention and costs; but if they find the hulband was about tized, but did not die so, then no costs or damages, but only he value of the land; for damages are only given by state of the land; for damages are only given by state of the land; for damages are only given by state of the land; for damages are only given by state of the land; for damages are only given by state of the reason why the jury are to find the value of the land in case the hulband died seized, is, that the court may give smages pursuant to the statute of Merton, from the death of the hulbands to the time of the judgment. And if the heir

flud a behulband, to the time of the judgment. And if the heir of the to J. S. and the widow recovers her dower against him, and the must pay the whole mesne prosits, from the death of the husband,

#### Of Judgment in Dower.

2. Of final Judgment, Writ of Enquiry, Seifin, &c.

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hulband, though he have not himself been half the time in polletion. She is entitled by the flatute, and can recover only against the tenant. Brown and Ux. v. Smith. Hil. 25,

26 Car. 2. C. B.

Damages must be after demand of dower; for the heir is not bound to affign till demanded. But unless the heir plead tout temps prift, he shall not take advantage of the widow's laches in not demanding; and though he pleads tout temps prist, yet the shall recover damages from the teste of the one ginal, to the execution of the writ of enquiry; but if the heir affign dower, and widow accepts thereof, the loses her damages. Co. Lit. 32. Kent and Kent, Mich. 1733. B.R. Yeo and Yeo. 14 Geo. 2. B. R.

Upon a trial at bar, the iffue was, if there was a demand of dower to entitle plaintiff to damages; the proved an actual demand of the heir, who was an infant; and the court held that dower was demandable of the heir, though under 14; and that the not affigning of dower, though the infant did not refule to do it, but was prevented by his guardian, was a refusal in law sufficient to entitle plaintiff to damages,

Corfellis v. Gorfellis. Hil. 29, 30 Car. 2. C. B.
On execution of a writ of enquiry of damages, the jury found for damages the value of a third of the land, from the time of the hufband's death, till the day of the inquilition, without any deduction for reprizes, (viz. land tax, repairs, and chief rent) and for costs, the jury gave the amount of the attorney's bill for demandant, upon his evidence that it was à reasonable bill, and that he expected it from his client The court thought that the value of the third of the profits run fince the death of the husband, should have been computed only to the time of awarding the writ of enquiry, and not to the day of the inquisition; that an allowance ought to have been been made for reprizes; the words of the writ are (ultra reprifas); and that the attorney's bill to his client was the measure of costs. The inquisition was set aside, and new writ ordered to be executed before a judge at the next affixes, on payment of costs. Barnes, 234. Q. If the jury ought not to have given common costs as one shilling, and the rest allowed as costs de incremento by the prothonotary. Bu It has been faid, that if the jury give damages a morte viri, to the time of the inquilition, though it is after the judgment it will be good. R. Leon. 56. So though they give damages beyond the value of the land

Dower

## Of Judgment in Dower.

2. Of final Judgment, Writ of Enquiry, Seifin, &c.

Value or damages are only recoverable in dower unde nil babet. Co. Lit. 32. b.

The writ of feisin, and enquiry of damages, are blended in

one writ.

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If dower is demanded of lands, or of things that may be severed, the Sheriff ought to assign her third part by metes and bounds; and if the Sheriff does not return seisin by metes and bounds, it is ill, unless closes certain are assigned by name, or such a manor which is known and certain, in lieu of dower of other manors. Perk. 414. Rol. Abr. 682. Co. Lit. 34. Bendl. 87. But an assignment, though in a different manner by consent of the parties, may be good. Cro. El. 310. Rol. Abr. 683.

110. Rol. Abr. 683.

If a woman be dowable in three manors, and accepts of the heir one of those manors, in lieu of dower in all the rest, this is good, though against common right, which gives her

but the third part of each manor. Roll. Abr. 683.

But to a writ of habere facias feismam, the Sheriff cannot return that he delivered the demandant one, instead of a

third part of the three in recompence of her dower.

Upon recovery of dower, and feifin awarded, the Sheriff returned that he had affigned to the demandant her dower of a house, the third part of each chamber, and had chalked it out to her. And this return was held an idle and malicious return, and he was committed for it, as in such case, he ought to have affigned her certain chambers, or rooms thereput. Palm. 265.

The Sheriff was committed, for refusing to make an equal allotment of dower, and taking 60 l. of demandant to execute the writ, and the court ordered an information against

him for it. I Keeb. 743.

If dower is demanded of meadow, pasture, &c. the Sheriff may assign all meadow, &c. for dower. R. Mod. 12. 19.

A woman recovered dower, had a writ to the Sheriff, who returned that he had delivered 84 acres to the demandant of the land mentioned in the writ. After a fire facias was brought, suggesting that 60 acres of the 84 assigned to her by the Sheriff were a stranger's, not mentioned in the record, and therefore she ought to have a new division. The tenant said, that the other 24 acres were parcel of the land recovered, and that she had entered and accepted the 24 acres; and upon demurrer it was adjudged, that she was barred by the acceptance and entry into the 24 acres. Moor pl. 167. 1928. Dy. 91. in margine.

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## Of Judgment in Dower,

2. Of final Judgment, Writ of Enquiry, Seifin, &c.

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Dower was brought de tertia parte of a mill, kiln-house, &c. and judgment was to recover the third part in separalitate per metas & bundas. And this judgment was reverted upon error, for it ought to have been of the third part generally; for if per metas & bundas, none can make use of it. Lev. 181. 2. Keeb. 8.

If demandant dies before writ of enquiry executed, her administrator cannot bring a scire facias for the damages and

So if tenant dies after judgment and writ of feisin executed, the demandant cannot have a scire facias for enquiry of damages, after the death of the tenant, against his heir or

By 16, 17 Car. 2. c. 8. execution shall not be stayed by writ of error, upon any judgment after verdict, unless plaintiff become bound to pay damages and costs in case of affirmance, or plaintiff discontinue or be nonsuit; and a writ shall issue to enquire of metine profits, and damages by waste done after the first judgment. Stra. 971.

Judgment in dower shall not be stayed by error, if plaintiff in error doth not enter into recognizances to pay damages

Note, If judgment be affirmed in dom. proc. and costs given, the demandant may bring an action on the recognizance for fuch costs, without fuing out a writ of enquiry. s from any saction court of ranged in England : 53! . but

ammon Plans except in two or three cases; for which uide on Dig. Rac Abr. Sm. But the better opinion Gens to be; that error lies not into C. B. in any case. In court newly coalituted, and which are impowered to proceed as a siethod different from the courts of common law, their judgment

not subject to a writ of error; but yet the King Benth may examine them by certierare, or mandamus. Till the late repeal of the declaratory all 6 Gas I. wasa

the House of Lords in Irdand had no jurisdiction of error from any court there; and error in a judgment in the king's Bench in Ireland, lay immediately in the King's Bench bere.

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But now the House of Lords in Ireland will be the deviller il there, soit is in England - A Writ of error lies for some mistake, or supposed mistakes, in the proceedings of a court of record; for to amend errors or mistakes in a base court, not of record, a writ of false judgment lies; of which here-after.

Awrit of error is a writ of right in all cales but felony and

treason. Salk. 504. and may be had against the king.

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Error lies either in the same court where the judgment was, or in a superior court.—It lies in the same court where the judgment was given, when the error was not for any fault in the court, but for some defect in the process of the cause, other than in the judgment, or for default of a contimance. Dy. 196. a. or for default in adjudging execution. 1861. 176. 7 H. 6. 30 Yelv. 157, F. N. B. 21. I. as for misprision of the clerk, or for error in fact; and there the wit may be in the fame court .- I Sid. 208. except where such error is in the Exchequer. 3 Lev. 38.—But if there is error in law, or in the judgment of the court, then the writ lies to a superior court; and such writ of error only lies upon matter of law arising upon the face of the proceedings, so that no evidence is required to substantiate or support it: for if there has been an error in the determination of the falls in the cause, which it was the province of the jury to determine, the method of obtaining redrefs in such case, is not by writ of error, but by an attaint of the jury, or appealing to the justice of the court to grant a new trial, in oror to correct the miftakes of the former verdict.

A writ of error lies from almost all inferior courts of record in England Into the King's Bench. But error does not lie from any inferior court of record in England into the Common Pleas, except in two or three cases; for which vide Com. Dig. Bac. Abr. &c. But the better opinion seems to be, that error lies not into C. B. in any case. In courts newly constituted, and which are impowered to proceed in a method different from the courts of common law, their judgment is not subject to a writ of error; but yet the King's Bench

may examine them by certiorari, or mandamus.

Till the late repeal of the declaratory act 6 Geo. 1. c. 5. the House of Lords in Ireland had no jurisdiction of error from any court there; and error in a judgment in the King's Bench in Ireland, lay immediately in the King's Bench here. But now the House of Lords in Ireland will be the dernier

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rafer there, as it is in England.

# Of proceeding in Error from INFERIOR Courts

I he there is green in the proceedings of an inferior count of record, application must be made by the plaintiff in ere for to the curlitor for a writ of errers which write may bear telle before the judgment given; and this is the utual course for preventing and superseding the execution; but then judgment below must be given before the return of it. 3 Keeb. 308. Vent. 96. Latch. 133. For if it should be made returnable before judgment given, it is fuch a failt as is not amendable. Stra. 807. On a process of the curlitor. Upon a short abstract or pracipe delivered, the curlitor.

will make out the writ of error returnable in B. R. as that court has, by its constitution, a superintendency over all

execution that be flayed or deleved , snoithfully roinfini If error is in the county palatine of Lancafter, the writ is directed to the chancellor or his deputy, commanding, that he give in charge to the justices at Lancaster, that they send to him in his chancery the record &c. and the writ which came to them thereupon, and that he transmit the record.

But if an erroneous judgment be given in Durbam, in the chancery, upon proceedings according to the common law, or before the justices of the bishop, a writ of error lies before the bilhop himself; and if he gives an erroneous judgment, error lies in the King's Bench. Lave but that die die to

Errors in judgments, real and mixt, before the justices in their great fessions in Wales, lin in the King's Bench, by the

35 of Hen. 8. c. 26.

the delaying of execution," And errors in judgments, in pleas personal there, lie also in

the King's Bench, fince the flat. 1 W. & M. c. 27. West build

But error on a judgment in the cinque ports, lies neither in the King's Bench nor Common Pleas; but by custom, such judgment is examinable by bill, in nature of a writ of error, coram domino custode, sue guardiano quinque portium apud curiam suam de Shepway.

Nor does error lie in the King's Bench or Common Pleas, on a judgment in the flamaries, but an appeal to the guardian, and from him to the prince, and if no prince, to the

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that the writ of error is not returned, alianua sanik

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It is a certain rule, that all the parties to the fuit below; must, in all cases of error, be made parties also in the writ of error; and in case of the death of a party, he must be named, and his death alledged in the surit. And if one refuses, he should be summoned and served. Carth. 7. Stra. 606. m time sint bal

# Of proceeding in Error from INFERTOR Courts.

As foon as the writ is made out, the party who fued it must carry it to the prothonoury of the inferior court, and get it allowed; and if execution should have been sued out, that officer will also grant a supersedent to the same; but it no execution should have issued, the allowance of the writ of error is of itself a sufficient supersedent, and no execution

on then be taken out.

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Upon a writ of error to remove the record from an inferior court, the party removing it need not formerly have out in bail below; for the statutes requiring bail upon procuting error, did not extend to the inferior courts of record. But, now, by the stat. 19 Geo. 3. c. 70. f. 5. " No execution shall be stayed or delayed, upon or by any writ of error, or supersedeas thereon to be sued, for the revers-"ing of any judgment in any inferior court of record where the damages are under 101. unless such person or persons, in whose names such writ of error is brought, with two fureties, fuch as the inferior court shall prove, before such stay made, or supersedens awarded, be bound unto the party for whom such judgment was given in a recognizance to be acknowledged in the fame court, in double the sum adjudged to prosecute such writ of er-ror with effect; and pay (if the judgment is affirmed or writ of error nonproffed) all the debt, damages, and cofts adjudged; and all cofts and damages awarded for the delaying of execution."

On the return of the writ of error, the defendant in error hould serve the plaintiff in error with a rule out of the interior court to transcribe the record, who, upon service thereof, should be speak the transcript of the record of the proper officer below, and carry the same into the office, and file the same, if in B. R. with the signer of the writs. The officer who is to receive and deliver out writs of error,

and certiorari, &c. now Mr. Heberben.

The transcript should be filed before the second seal or the defendant in error may apply and get a certificate from the office, that the writ of error is not returned, and the transcript brought in; and may thereupon apply to the cursitor for a writ of executio judicis directed to the court below, and commanding them, that, notwithstanding the writ of error, they proceed to execution on the said judgment.

If the transcript is brought in by the effeign day of the term, the defendant in error may sue out a sci. fa. quare ex non; and this writ may bear teste the last day of the preceding

term

## Of proceeding in Error from INFERIOR Courts

term. And if the transcript is brought in within term, such

fci. fa. may bear tefte the first day of that term.

The defendant in error cannot transcribe the record, a Wilf. 35. but if the plaintiff does not transcribe it, he must be served with a rule to transcribe. But if the transcript of the record is carried in and filed in due time, each party ought to bespeak a copy thereof, which is made out at the rate of 4 d. per sheet; and the defendant in error should then, in order to accelerate the plaintiff in error, sue out a scire faciar quare executionem non, directed to the Sheriff of the county where the original action was brought, and which is to this effect:

GEORGE the third, by the grace of God, &c. To the Sheriff of \_\_\_\_ greeting. Whereas A. B. lately in our court of \_\_\_\_ [the inferior court] before the judges of the same court without our writ, and by the judgment of the same court, recovered against C. D. 101. for his damages which he fuftained, as well by occasion of the not performing certain promises and undertakings made by the faid C. to the faid A. at --- in your county, and within the jurisdiction of the same court, as for his costs and charges expended by him about his fuit in that behalf whereof the faid C. is convicted, as by inspecting the record and process thereof in our court, before us at Westminster, now remaining, and which for certain causes we lately caused to be brought in our same court before us, appears to us. And now, on behalf of the faid A. in our court before us, we have been informed, that although judgment be thereof given, yet execution of the faid damages still remains to be made to the faid A. Whereupon the faid A. hath befought us, that a proper remedy may be provided for him in this behalf: And we, being willing that what is just should be done in this behalf, do command you, that, by good and lawful men of your bailiwick, you make known to the faid C. that he be before us on \* --- wherefoever we shall then be in England, to shew if any thing he has or knows to say for himself, Qfij

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<sup>\*</sup> A sci. sa. quare executionem non on error from C. B. and all other writs and process must be returnable on a general return ubicunque, and have fifteen days between the teste and return i. e. between the teste of the first, and return of the second writ.

## Of proceeding in Error from INFERIOR Courts.

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why the said A, ought not to have his execution against him of the damages aforesaid, according to the force, form, and effect of the said recovery, if it shall seem expedient to him; and further to do and receive, what in our same court before us shall be considered of him in this behalf, and have there the names of those by whom you shall make known to him, and this writ. Witness, &c.

If plaintiff in error does not assign his errors, when the transcript is brought in, the defendant has no way to quicken him, but by a sci. fa. quare executionem non; for upon the removal of the record, the parties have no day in court given to either. Carth. 40.

If nibil is returned to this writ, the defendant in error may be out an alias feire facias, which differs only from the above in this, that it is said, "do command you as before we have commanded you, that by good and lawful men, &c."

If a scire feci is returned to the former writ, or there be mibil also returned to the latter, the defendant in error must inter a rule with the clerk of the rules, which is given in the me manner as a rule to plead, and which expires in four ins. After the expiration of which, if the plaintiff in cor has neglected to assign errors, the defendant may enter n award of execution on the roll for the amount of ejudgment below; but then the defendant in error is not ntitled to costs, nor is the plaintiff thereby precluded from proceeding in his writ of error, but may afterwards seed therein and affign his errors, even though execuon be actually executed; and in such case, after assignent of errors, joinder in error, and argument thereon, if is judgment given below be reversed above, the plaintiff error shall have restitution of all he hath lost by reason the execution.

An motion to set aside an execution taken out upon a adjunction a scine sacial quare ex. non, because they had because errors before. On reference to the master, he remoted an old rule, that if the party pleads to the scire sacias, and it goes against him, execution may be sued out; but that the writ of error shall go on notwithstanding. Where-

But defendant in error cannot give a rule to affigu errors force he has given a rule on the sci. fac. quare ex. non. Stra.

# Of proceeding in Error from INTERIOR Courts

spon the court, in confideration of the delay, established it as a standing rule, for the future, that if upon the return of the feire focias the plaintiff affigns his errors, then all farther proceedings thall be flayed upon it; but where he chuses to stand out upon pleadings to the scire facias, execution shall go if it be adjudged against him. Gardner v.

Clarton. Stra. 391. vide also Stra. 679.

To a fci. fo. quare ex. non fued out by defendant in error, in order to compel plaintiff to affign his errors, the plaintiff in error pleaded, that the defendant had fued execution in the Common Pleas, and levied his debt recovered. On motion. this plea was let afide as a fham plea fas a plea of payment in the like case was ] for the meaning of suing out this wit, is only to compel the plaintiff in error to affign his errors; eccasion great delays and vexation in the recovery of debts.

Parker v. Stanton. Ld. Raym. 1414. Hallor delay managed.

Motion to quash a fei. fa. quare ex. non fued out by de-fendanc in error, to make plaintiff affign, because the original fuit in C. P. was by bill of privilege, and the fci. fa. therefore ought to be made returnable on a day certain, but this was returnable on a common return. And of that opinion was the court, because feire facias's ought always to be made returnable according to the original fuit below. And in Trin. I's Anne, between Vavafor and Parker, it was adjudged to by the King's Bench, in a fimilar case. The writ was quashed,

Eden v. Wills Ld. Raym. 1417 offe rierre sid ngille diw

It kems to be the practice now to admit of no plea by the plaintiff in error to the ki. fa. guare ex. non, fued out by defendant in error: but plaintiff in error must instantly affign or defendant in error to come in, an

his errors, 179 and 11 Rule to flew cause why proceedings on a sci. far quare is. below, pending a writ of error, should not be frayed. On showing cause, it appeared, that the record of the judgment was not transcribed into B. R. and the sci. fa. out of C.B. was therefore held regular. The executor may revive, but cannot take out execution pending error. After a transcript the fci. fa. quare ex. non, should go out of B. R. Plaintiff in error (if defirous to proceed) might, after a transcript, have a sci. fa. ad aud. errores out of B. R. against the executor or administrator of the deceased plaintiff below. Rule difcharged. Barnes, 432. and is to amprovide with of circus

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## Of proceeding in Error from INFERIOR Courts.

After the record removed into B. R. plaintiff in error for lome time neglected to fue out a fci. fa. ad aud. errares. Whereupon plaintiff, in the original action, fued out a fci. fa. care ex. non, and upon two nihils had judgment, and exeion executed. Afterwards, plaintiff in error moved to let slide this judgment on the fci. fa. because his errors were affigned on the record; and on examination it appeared they were affigued without any notice. Per Holt. G. 7. The rties upon the removal of the record by writ of error, have nd day in court given to either: Wherefore if plaintiff in grot, delay to fue his fer. fa. ad aud. errores, the defendant bath no way to compel him, but by a fei. fa. quare ex. non's and if upon such for. fa. plaintiff in error doth not plead, that his errors are affigned, but fuffer judgment to pals upon two ibility no errors afterwards affigued, shall prevent execution. Note. The usual practice is, that defendant in error by confent, doth voluntarily take notice of the affigument of errors, and this confent is testified by his pleading in mullo eff irratum, and there is no occasion for a fci. fa. ad aud. errores.

Mofely v. Gocks. Carth. 40. In Lynche v. Coote, 3 Salk. 145. It was held by Holts 6.7. that if plaintiff in error lie still after a writ of error brought, this is no discontinuance of the write. And that defendant in error hath no other way, but to bring a fer. fas are ex. non; and it will be no plea for plaintiff to plead, that there is a writ of error depending, but he must forthwith affign his errors after such sci. fa. brought. And in his case there is this difference; wiz. If the sci. fa. is enand on the fame roll with the writ of error, then he may then his errors without fuing forth a fci, fa. ad aud. errores, for defendant in error to come in, and bear the errors assignde otherwise he must sue out a sci. fur ad aud. errores, to give

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Note Where a writt of error is brought, and no record tertified at the day of the return of the writ, the defendant merror should take out a certificate thereof from the proper officer of the court with whom the record ought to be lodged. with the return of the writ of error; and upon obtaining fuch lettificate, he may take out a writ de executione judicii of course; and the party cannot hinder execution thereupon, without he brings a new writ of error. 3 Salk. 146. When the record is certified, and plaintiff does not affign

his errors, upon the sci. fa. quare ex. non, defendant's best method of proceeding is to nonpros the writ of error.

Of proceeding in Error from INFERIOR Courts, and herein of NON-PROSSING the Writ of Error.

TO prevent the plaintiff in error from re-assuming the proceedings after the rule is out, upon default made upon the scire feci, or upon two nibils returned to the sci. sa. quare ex. non, the better way for the defendant in error to proceed is, to nonpres the writ of error; which is done, by getting another rule from the matter [after the former rule is out upon the back of the transcript of the record for the plaintiff in error to assign errors de recordo. Enter this rule with the clerk of the rules, and serve a copy thereof on the plaintiff in error's attorney; upon which, if the plaintiff in error does not assign his errors within four days, the defendant may sign a nonpres, and then may have his costs taxed and allowed.

The entry of a nonpros in error from an inferior court, after two feire facias's and nihils returned, is in this manner.

Hilary term, twentieth of Gerge the third.

" England, to wit. C. D. puts in his place William Lyon, his attorney, to profecute his writ of error against A. B. in a plea of trespass on the case.

England, to wit. The faid A. B. puts in his place George Hodgson, his attorney, against the said C. D. on the said

writ of error in the plea aforefaid.

England, to wit. Our lord the king hath fent to the judges of his court of \_\_\_\_\_ [name the inferior court] his writ close in these words, "to wit," George the third, &c. [here copy the writ of error, and the transcript of the record, according to the office copy thereof] afterwards, to wit, on \_\_\_\_\_ next, after the office of Saint Hilary, in this same term, before our lord the king at Westminster, comes the said A by his attorney aforesaid, and says, that execution of the said judgment still remains to be made to him; therefore he prays the writ of our lord the king, to be directed to the sheriff of the said county of \_\_\_\_\_ to warn the said C. to be before our lord the king, wheresoever, &c. to shew if any thing he has or knows to say for himself, why the said A ought not to have his execution thereof against him of his damages, costs and charges aforesaid, according to the force, form and effect of the said recovery; and it is granted to him,

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Of proceeding in Error from INFERIOR Courts, and herein of NON-PROSSING the Writ of Error.

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him. &c. Ge. by which it is commanded to the sheriff of the county Sire facias of \_\_\_\_, that by good and lawful men of his S bailiwick he make known to the faid C. that he be before our lord the king on --- wherefoever, &c. to shew in form aforesaid, if, &c. And further, &c. the fame day is given to the faid A. &c. at which day, before our lord the king at Westminster, the said A. comes by his attorney aforefaid, and the sheriff of the faid Mibil re- county of -, to wit, O. P. Esquire, re-Sturns, that the faid C. hath nothing in his baihwick, by which he can make known to him; nor is he found in the same: Therefore, as before, it is commanded to the sheriff of - aforefaid, that by good and lawful men, &c. he make known to the faid C. that he be before our lord the king, on —— wherefoever, &c. to shew in form afore-Alias scire facias faid, if, &c. And further, &c. the same day is given to the said A. &c at which day, before our said lord the king at Westminster, the said A. comes by his attorney aforefaid; and the sheriff of the said county of --- to wit, I the faid O. P. Esquire, likewise returns, that the faid C. hath nothing in his bailiwick, by which he can make known to him, nor is he found in the fame: and the faid C. although on the fourth day solemnly required, came not, but made default: and upon this the faid A. faith, that the faid C. hath not yet affigned error or errors in the faid record langiven to af} and proceedings. Therefore a day is fine tross.

given to the faid parties, before our lord the king at Westminster, until, &c. — [the day in the the given by the mafter] to wit, to the faid C: to affight error or errors in the faid record and proceedings, &c. At which day, before our lord the king at Westminster. the faid A. comes by his attorney aforesaid; and the faid at that day, although folemnly demanded, comes not, but makes default; nor doth he further profecute his faid writ of error against the said A. It is therefore considered; Independent. I that the faid C. be in mercy, and that the faid A. have therefore his execution against the faid C. of his damages, costs and charges, according to the force, form, and effect of the faid recovery, &c. And

Of proceeding in Error from INFERIOR Courts, and herein of NON-PROSSING the Writ of Error.

it is further considered, that the said A. recover against the said C. —— pounds, adjudged to the said A. by the court of our said lord the king now here, according to the form of the statute, for his damages, costs and charges, which he hath sustained by occasion of the delaying the execution of the said judgment, by pretence of prosecuting the said writt of error, and that the said A likewise have execution thereupon, &c."

The bail in error are liable in case of a nonpros; Barnes 71. for they are bound to prosecute the writ of error with effect. Ibid. 499.

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Of proceeding in Error from INFERIOR Courts, and herein of affigning Errors, and making up the Error-book, &c.

F the plaintiff in error appears and proceeds, the next step is to assign errors. An assignment of errors may be either general or special, and in either case must be signed by counfel.

The plaintiff may affign for error, error in fact, or error in low. F. N. B. 20. E. But he cannot affign both, for this will be double. 1 Rol. 761. 1. 35. 1 Lev. 105. 76. 1 Sid. 147.

Nor can he affign several errors in fact, but he may several

errors in law. F. N. B. 20 E.

In error from an inferior court, the plaintiff in error cannot alledge diminution of the record. Sid. 40. 147. Nor can the defendant; but the court, if they fee occasion, may award a certiorgri ad informandum conscientiam.

Nor can he affign for error matter contrary to the record. Cro. Fac. 21. 1 Lev. 76. 1 Salk. 262. 1 Lev. 313. Cro.

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Nor matter which he might have pleaded. 1 Rol. 762. 1. 40. Though judgment were by default. Though Dub. Cro. Fac. 547 .- But Carth. 124. fays-Not matter which

might have been pleaded in abatement.

An assignment of errors is in the place of a declaration in error, and must be engrossed and delivered over to the delendants on treble-penny stamped paper; the entry whereof is in this form:

#### Hilary term, twentieth George the Third.

Stormont and Way.

And the faid C. by William Lyon, his attorney, comes and fays, that in the record and proceedings aforefaid, and also in giving the judgment aforefaid, there is manifest error in this; to wit, That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said A. to maintain his faid action against the said C: there is also error in this, that by the record aforesaid here sent, it appears, that the judgment aforesaid, in the plea aforesaid, in form aforefaid given, was given for the faid A. when by the law of the land of this kingdom of England, judgment in the plea aforesaid ought to have been given for the said C. against the said A. and so the judgment aforesaid is erroneous; and hereupon the faid C. also prays, that the VOL. II. judgOf proceeding in Error from INFERIOR Courts, and herein of affigning Errors, and making up the Error-book, &c.

judgment for the faid errors, and other the errors in the record and proceedings aforefaid, may be reverfed, annulled, and fet aside, and that he may be restored to all things which he hath lost by occasion of the faid judgment, &c."

George Bond,

If plaintiff in error moves to amend his affignment of errors, it is always on payment of costs, for he comes for a favour of the court. Fitzgib. 268.

The transcript on record ought to be entered by the plaintiff in error the fame term it is brought into the office; but if he neglects so to do, the defendant in error may enter it.

As foon as the transcript is entered, and the plaintiff hath also assigned his errors, and entered the same on record; and if the desendant does not immediately plead, or join in error, the plaintiff may sue out a scire facias ad audiendum errores, which is to this effect:

GEORGE the third, &c. To the Sheriff of ing: Forafmuch as in the record and proceedings, and also in the giving of the judgment in a certain plaint lately levied in our court of — before the judges of the same court between A. B. and C. D. of a plea of trespon on the case, manifest error, as it is said, hath intervened to the great damage of the faid C. as by his complaint we are informed; which faid record, and proceedings therein, we have, for certain reasons, caused to come in our cour before us; and we, being willing, if any error there be to correct the same, and to do unto the parties aforelaid full and speedy justice in this behalf, do command you that, by good and lawful men of your bailiwick, you make known to the faid A. that he be before us in wherefoever we shall then be in England, to hear the proceedings aforesaid, if it shall seem expedient unto him and further, to do and receive what in our faid court before us shall be considered of him in this behalf, and have there the names of them by whom you shall make known unto the said A. as aforesaid; and this writ. Witness, &d

If the defendant in error does not come in and plead, of join to the affigument of errors upon the return of the

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Of proceeding in Error from INFERIOR Courts, and herein of affigning Errors, and making up the Error-book, &c.

fire facias ad audiendum errores, the plaintiff may have an alias scire facias, &c. and upon default thereto, the plaintiff in error must proceed to argument, and will be heard

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After judgment for the defendant the plaintiff brought error, and affigned infancy in defendant, and appearance by
attorney, then took out a fci. fa. ad aud. errores; and after a
fire feci returned, entered the default; and on producing
the record, the judgment was reversed on motion, without
making it a concilium, or putting it in the paper. Walmsley

v. Rofon, Stra. 1210.

If the errors affigned are *special*, the joinder in error must be figned by counsel, and ingrossed on stamped paper, and then delivered over to the plaintist's attorney: but if the errors affigned are *general*, the desendant's attorney may join in error directly, and deliver the common joinder in nullo of erratum, on a treble penny stamped paper, to the plaintist's attorney, paying him 25. 4d. for entering the same on record.

Stormont and Way.

Hilary term, twentieth George the Third.

ats. There is not any error.

George Hodgson, attorney for the defendant in error.

The joinder of " in nullo est erratum" to an affignment of tror in fact, is a confession thereof, if the error in fact be well affigned; for if error in fact be affigned, and the defindant in error would deny it, he should not join in nullo est watum; but ought to take issue upon it, so as to have it tried

y the country. Sid. 93. Raym. 59.

But if the affignment is of an error in fact, and that be affigned, "in nullo est erratum" is no confession of it; if it be affigned, that such a one, at the time of the removed; there, in nullo est erratum is no confession of that such a because the record thereof is not in court, that being no part of the record, for the plea is in nullo est erratum in mords. Cro. Jac. 12. 29. 521. Raym. 231. Cro. Car. 421. Rol. Abr. 758.

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Also if an error in faet, that is not assignable, be assigned, and in nullo est erratum be pleaded, it is no confession; as if it be assigned, that on such a day there was no court sitting; because that is against the record, and then in nullo est erratum is only a demurrer. So if a man says, he did not appear, and the record says he did, in nullo est erratum is no confession, but a demurrer, because it is against the record. Vide Bac. Abr. title Error, 2 vol. 218. and authorities there cited.

If the plaintiff in error therefore affigns error in fact, which is affignable, and the defendant would not confess it, he must not join in nullo est erratum, but plead thereto, and then the parties go to issue upon the error in fact, the record is made up, as in other cases, and the matter goes to

a jury.

But where the defendant joins in nullo est erratum, the parties thereupon are at iffue in law for the determination of the court; and in such case either of them may enter the same on record, and move for a concilium, or day, for arguing the errors. Then the cause for argument must be entered with the clerk of the papers, and error-books made up and delivered to the respective judges of the court, in like manner as upon argument of a demurrer\*.

By pleading in nullo eft erratum, the defendant admits the record to be perfect, and cannot afterwards alledge diminu

tion. I Salk. 270.

The defendant in error cannot give a rule to affign er rors, before he has given a rule on the feire facias quare executionem non.

A rule to affign errors was fet afide, because given befor any rule on the scire facias quare executionem non. Marsh

v. Cope, Stra. 917.

If the plaintiff in error, on being ferved with a rule of that purpose, assigns his errors, and the defendant joins nullo est erratum, in making up the record, pursue the for going precedent of a non-pross as far as the day given upon trule, and then go on with the joinder in error, &c. in t following manner:

<sup>\*</sup> For the instructions to do which, wide title Demurrer, & in the first vol.

Of proceeding in Error from INFERIOR Courts, and herein of affigning Errors, and making up the Error-book, &c.

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" Whereupon the faid A. B. by George Hodgson, his attorney, comes and faith, that neither in the record and proceedings aforefaid, nor in the giving of the judgment aforefaid in any thing is there error; and he prayeth, that the court of our lord the king now here may proceed to the examination, as well of the faid record and proceedings aforefaid, as of the matters aforefaid above affigned for error; and that the judgment aforefaid may be in all things affirmed. But because the court of our said lord the king now here are not yet advised of giving their judgment of and upon the premisses, therefore a day is given to the faid parties to be before our lord, until, &c. -- whereseever, &c. to hear judgment thereof; for that the court of our faid lord the king is not yet advised thereof: at which day came here into court, as well the faid C. as the faid A. by their attornies aforefaid; upon which the premisses being considered, as well the record and proceedings aforefaid, as the judgment aforefaid on the fame given, and the causes before for error assigned, being by the court of our lord the king here diligently examined, and fully understood; it seemeth unto the court of our said lord the king here, that the judgment aforefaid is not in any wife vicious or defective; and that in the faid record there is Therefore it is confidered by not any thing erroneous. the faid court of our lord the king, before the king himself now here, that the judgment aforesaid in all things be affirmed, and do stand in its full force and effect (the faid causes above for error alledged in any thing notwithstanding); and it is further confidered, that the faid A. B. do recover against the said C. D. sixteen pounds ten shillings, by the court of our faid lord the king now here adjudged to the faid A. at his request, for his costs and charges which he hath expended by reason of the delay of the execution of the faid judgment, and by the profecution of the laid writ of error.

Upon affirmance of the judgment, the defendant in error may take out his execution, either a fi. fa. ca. fa. or elegit—which writ of execution recites the former judgment below, the removal of the record into the court above, and the affirmance thereof, together with the costs given upon the affirmance.

If

Of proceeding in Error from INFERIOR Courts, and herein of affigning Errors, and making up the Error-book, &c.

If judgment was given below for the defendant, and the plaintiff brings error, and thereupon the court reverses the former judgment, the court above gives such judgment as the court below ought to have given—and then there is no costs upon the writ of error, but only the costs of the original action given. Wyvill v. Stapleton, Stra. 617.

On writs of error from inferior courts, the superior court takes notice of the laws and customs of inferior courts; but otherwise upon removal of a cause by babeas corpus. Salk.

On error into B. R. of a judgment in an inferior court, it was reversed for want of an averment in the declaration, that the cause of action arose within the jurisdiction. Ld. Roym. 1310. 2 Wilf. 16.

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write diate tion in b Of proceeding in Error from the Court of COMMON PLEAS into the KING'S BENCH.

If an erroneous judgment is given in the Common Pleas, the writ of error, in all cases, is made returnable into the

court of King's Bench.

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In order to bring error, the attorney for the party suing it finds the number of the judgment roll from the docquett of the prothonotary's office, and thereby finds the roll in the treatury, of which he makes a copy, and thereupon the cursitor makes out the writ of error. Comp. Att. 63. Which may be sued out before judgment, but judgment must be given before the return of it. 3 Keb. 308. Vent. 96. Latch. 133.

When the writ of error is obtained from the cursitor, you must get it sealed, and then carry it to the clerk of the errors, and pay him his see for the allowance of it, who will give you a notice in writing of such allowance; after which you should serve the other party's attorney with a copy of the writ, and allowance thereof, which should be served immediately; for till it is served, it is no supersedeas to the execution; nor is it a supersedeas in many cases, unless bail be put in by the party suing the writ of error.

## Of BAIL IN ERROR, where requifite.

THERE are several statutes requiring bail to be given by the party prosecuting error to reverse a judgment; in order to understand which, I shall state the statutes in their order, and give several of the determinations of the courts

upon those statutes.

The first statute requiring bail on error, is the 31 El. c. 3.

J. 3. which enacts, "That before any allowance of any writ of error, or reversing of any outlawry be had by plea or otherwise, through or by want of any proclamation to be had or made according to the form of this statute, the defendant in the original action shall put in bail, not only to appear and answer to the plaintiss in the former suit in a new action to be commenced by the said plaintiss, for the cause mentioned in the first action, but also to satisfy the condemnation, if the plaintiss shall begin his suit before the end of two terms next after the allowing the writ of error, or otherwise avoiding of the said outlawry."

otherwise avoiding of the faid outlawry. The next statute requiring bail on error is the 3 fac. 1. c. 8. entitled "An act to avoid unnecessary delays of execution"-whereby it is enacted, "That no execution shall " be flayed or delayed upon or by any writ of error, or " supersedeas thereupon to be sued for the reversing of any " judgment given in any action or bill of debt upon any " fingle bond for debt, or upon any obligation with condi-" tion for the payment of money only; or upon any action " or bill of debt for rent, or upon any contract fued in any " of his highness's courts of record at Westminster, or in " the counties palatine of Chester, Lancaster, and Durham; " or in the courts of great fessions in any of the twelve shires " of Wales, unless such person or persons, in whose name " or names fuch writ of error shall be brought, with two " fufficient furcties, fuch as the court (wherein fuch judg-" ment is or shall be given) shall allow of, shall first, " before such stay made or supersedeas to be awarded, be " bound unto the party for whom any fuch judgment is e given, by recognizance to be acknowledged in the fame court, in double the fum adjudged to be recovered by the " faid former judgment, to profecute the faid writ of error with effect; and also to satisfy and pay (if the said judg-" ment be affirmed) all and fingular the debts, damages, and " costs adjudged upon the former judgment: and all costs and damages to be also awarded upon the delaying of ex-" ecution."

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This statute requires only bail to be given upon error to reverse any judgment of debt upon any fingle bond for debt, or obligation with condition for payment of money only, or action of debt for rent, or upon contract.

Therefore bail in error on a judgment in debt on bond, are each bound in the fum recovered, that being double the

fum due. I Wil. 213.

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But bail is not requisite upon bringing a writ of error upon a judgment in an action of debt founded upon a prior indgment. Biddleson v. Whytell. Burr. Rep. 4 pt. 1548. because this is casus omissus out of this act, which is to be taken literally and not extended by construction. Ibid. and

1 Blackf. Rep. 506.

A bond given by a third person, to a third person, as collateral security for a debtor's paying his creditors 15 s. in the pound upon a liquidated total of his debts, is a bond with condition for the payment of money only within this aft — Therefore, bail requisite. Burr. Rep. 4 pt. 746.—And it's being payable by instalments, makes no disference.

No bail is requifite in bringing a writ of error upon a judgment in debt on bond conditioned for performance of covenants, or upon a bail-bond—because these bonds are not conditioned

for the payment of money only.

But if the defendant brings error after judgment against him in an action upon a bottomree bond, he must put in bail; because, the contingency having happened, this is now, in every respect, a bond for the payment of money. Stra.

476.

Motion for leave to take out execution, no bail being put in on a writ of error brought by defendant, the action being in debt on bond, conditoned only for payment of money according to the true intent and meaning of an indenture, and not performance of covenants. On shewing cause, the court held that bail was required by 3 fac. 1. If the bond had been generally for performance of covenants in an indenture, and the only covenant in that indenture had been for payment of money, bail must have been given on error. But the court gave time to put in bail. Barnes, 98.

The condition of a bond was for the payment of 500 l. at such a day, being the sum mentioned in certain indentures of such a date. And error being brought, the plaintiff in error would have been excused from giving bail,

because

because the words of 3 Jac. 1. are "bonds for payment of money only;" whereas, this was rather a bond for performance of covenants. But the court held, that bail ought to be given; for the material part of the condition was the payment of 500 l. and the other words were only added to thew they were not diffinct debts, but only different securities for the same. Desolutes v. Horsey. Stra. 959.

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Action upon an insimul computation in G. B. error brought in B. R. after judgment for the plaintist—and upon the question of bail being requisite—Per cur. This case is out of the statute, for the debt recovered did not accrue by any contract or other duty certain at first, but merely upon an account between the parties, which account has reduced divers uncertain sums to one certainty—Therefore, as the action was sounded upon the account, which is uncertain, this case is out of the statute.

The same law in debt upon an award, when the arbitrators have reduced divers controversies to be recompensed by one sum: though this is a debt, yet it is not such a one as is intended by the statute, which must be a debt certain at first. Yelv. 227. 2 Bulst. 53.

The original action was in debt on bond conditioned to pay so much money as J. S. should declare to be due on an account; and, after pleadings below, error was brought on the judgment. And by all the judges, except Keeling, the planitiss in error must put in bail, or execution may go; for this obligation is made for the payment of money only, which, though not certain when the obligation was made, is yet certain before the action brought. I Lev. 117. 1 Keb.

613. 690.

The condition of a bond was to perform covenants in an indenture; and amongst the rest was one for payment of money, and the other were collateral; and the breach assigned, was for the non-payment of the money: Yet, on error brought upon the judgment, no bail was taken; for per Holt—this is not a condition for the payment of money only, but to do collateral acts. It is true, the breach assigned is for not paying the money; and therefore, the case upon the pleadings is the same as if the condition had been for the payment of money only, yet the condition is not for payment of money only. Carth. 28.

The condition of a bond was to pay for so much beer as should be delivered to S. not exceeding 100 l. After judgment upon demurrer below, error was brought. Et per cur-

7.

No bail requisite. This sum was not certain even at the time of the action brought. Thrale v. Vaughan. Stra. 1190. Will. 19.

But if an action of debt be brought on a bond, conditioned for the performance of covenants, and the defendant lets judgment go by default, without craving over of the condition, and after brings error, he must put in bail; because it does not appear to the court upon the record, that the condition was for performance of covenants. This is

the practice in B. R.

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But in C. B. it is otherwise, as appears by the following case. Plaintiff declared in debt on a bond, of which defendant craved over; and the condition appeared to be for performance of covenants. Defendant after over, instead of pleading, entered nil dicit; in order that over of the condition appearing upon record, he might bring a writ of error without bail. The court, on hearing counsel, set aside this entry, and gave plaintiff leave to enter judgment by default. And the question then was, whether the condition of the hond, not appearing on record, bail ought to be required on the writ of error or not? And the court held, that the matter of bail is properly examinable by affidavit; and the bond being conditioned for performance of covenants, bail ought not to be required. Spinks v. Bird. Barnes, 72.

Motion for bail upon error in an action of debt on bond, conditioned for payment of 300 l. mentioned in a furrender of a copyhold by way of mortgage, and not for performance of covenants, wherein judgment had passed by default. Per car. There must be bail. This case is out of the stat. 16 &

17 Car. 2. but within the stat. 3 Jac. 1. Barnes, 78.

By the 13 Car. 2. c. 2. [reciting the statute of 3 fac. 1. in the 8 feet.] 9 feet. enacts, "That no execution shall be stayed in any of the courts aforesaid, by any writ or writs of error or supersedent thereupon, after any verdict and judgment thereupon obtained in any action of debt grounded upon the statute made in the second year of the reign of the late king Edward the sixth, for not setting forth of tythes; nor in any action upon the case upon any promise for payment of money, actions sur trover, actions of covenant, detinue and trespass, unless such recognizance, and in such manner, as by the said

<sup>\*</sup> i.e. The courts mentioned in the statute of Jac. 1.

" recited former act is directed, shall be first acknowledged in the said court where such judgment is given."

Sect. 10. "Gives double costs to a defendant by delay of execution by reason of error brought, if the judgment be affirmed."

Sect. 11. Provides that the said statute shall not extend to actions popular; or upon penal statutes, indictments, &c.

other than the statute of Edward fixth mentioned." By the 16 & 17 Car. 2. c. 8. f. 3. it is enacted, " That " no execution shall be stayed in any of the aforesaid \* " courts, by writ of error or supersedeas thereon, after ver-" die and judgment thereupon, in any action personal "whatfoever, unless a recognizance, with condition ac-" cording to the statute made in the third year of king " James the first, shall be first acknowledged in the court " where such judgment shall be given:" And further, "That in writs of error to be brought upon any judg-" ment after verdict in any writ of dower, or in any action of " ejectione firma, no execution shall be thereupon or thereby " stayed, unless the plaintiff or plaintiffs in such writ of " error, shall be bound unto the plaintiff in such writ of " dower, or action of ejectione firma, in such reasonable sum " as the court to which fuch writ of error shall be directed " shall think fit; with condition, that if the judgment " shall be affirmed in the faid writ of error, or that the " faid writ of error be discontinued in the default of the " plaintiff or plaintiffs therein, or that the faid plaintiff or " plaintiffs be nonfuit in fuch writ of error, that then the " faid plaintiff or plaintiffs shall pay such costs, damages, " and fum and fums of money as shall be awarded upon or " after fuch judgment affirmed, discontinuance, or nonfuit " had."

And by feet. 4. "To the end that the same sum and sums and damages may be ascertained," it is enacted, "That the court wherein such execution ought to be granted, upon such affirmation, discontinuance, or non-suit, shall issue a writ to enquire as well of the mesne profits, as of the damages by any waste committed after the first judgment in dower, or in ejectione sirma; and upon

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<sup>\*</sup> The same courts as are mentioned in the statute of James 1. viz. the courts at Westminster, courts of the counties palatine, and great sessions.

### Of BAIL in Error, where requisite.

" the return thereof, judgment shall be given, and execu-" tion awarded for fuch mefne profits and damages, and also " for costs of fuit."

Provided, " That this statute shall not extend to any " writ of error to be brought by any executor or admini-" ftrator, nor any action popular or upon a penal ftatute, " (except the statute of Edward the fixth) nor upon in-" dictments, &c."

The rule upon error brought after verdict in ejectment for rent, is to justify bail in double the rent due. Burr. Rep.

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On error in ejectment, the plaintiff in error being in a remote part of the kingdom, found two fufficient men to be his bail, who were bound in a recognizance, &c. The court, holding that the intent of this statute of Charles the second being to secure the defendant in error, it was here fully observed, because this bail was better than the plaintiff's own recognizance. Barnes v. Bulver. Carth. 121. Good-

title v. Bennington. Barnes, 75.

Bail was put in by plaintiff in error in ejectment, but he himself was not bound as required by the statute 16 & 17 Car. 2. on which, plaintiff below moved for leave to take out execution, and obtained a rule to shew cause. For plaintiff in error it was urged, that it is become the constant practice to give bail by fureties, and more for the advantage of defendant in error. Per cur. before the statute 16 & 17 Car. 2. no bail was required in dower, ejectment, &c. By the stat. 2 fac. 1. bail was required in debt only. The stat. of Car. 2. extends to all personal actions after verdict, and requires sureties. In dower, real or mixt actions (and ejectment is a mixed action) after verdict it requires the party to be bound. This is a less security than by bail who justify, for the party Bail in error cannot be put in is bound by the judgment. before a commissioner in the country. The method of the statute cannot be followed without great inconvenience; and a better method, where the party lives at a distance from London, is substituted, and has been the practice ever since. Rule discharged. Lushington and Doe on dem. of Godfrey. Barnes, 78.

A recognizance on error in ejectment, ought to be in the value of two years mesne profits; and double costs is usually

taken in both courts. Barnes, 103.

Error on verdict in ejectment allowed, but plaintiff in error entered into no recognizance, nor put in bail, as plain-

tiff below had not got the costs taxed, without which, the measure or quantum of the recognizance could not be fixed.—Plaintiff below, for want of the recognizance and bail, in four days, took out an habere facias poss. and had possession given him, which the court held to be regular. Bt per cur. Defendant should have applied to stay execution, and then the court would have obliged plaintist to have got his costs taxed. The writ of error is no supersedeas without bail. A judge would have taken bail, if applied to: Rule discharged. Barnes, 212.

If judgment be against an executor or adminstrator de bonis propriis, and he brings a writ of error, he must put in bail in such cases as are required by the statutes before mentioned, and pay costs if judgment be affirmed; but if judgment be de bonis testatoris only, he shall neither put in bail nor pay costs—vide the proviso in 16 & 17 Car. 2.

Though an executor is not obliged to give bail on error, yet the court may take it; and if he does give bail, it is

binding. Stra. 745.

A fire facias against the defendant as administrator on a devastavit alledged, and judgment was de bonis propriis; on which he brought error; and by the whole court he shall find bail, for here he is charged in his proper goods, and it is not as where an adminstrator is charged in the testator's goods. 1 Lev. 245. 1 Sid. 368. 2 Keb. 295. 371.

After an award of execution against bail on a recognizance in error, they brought a writ of error as to such award of execution. Plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to shew cause, which was discharged: no bail in this case being requisite. Barnes, 194.

But in error on a judgment after verdict upon a sci. sa. against bail, there must be bail to the writ of error. 2 Blacks. Rep. 1227. And in this case held, that a sci. sa. is a personal action, and consequently within the statute 16 5 17 Car. 2. which requires bail on error of a judgment after verdict in any action personal.

Bail is not requisite, as it should seem [sed q.] upon bringing a writ of error returnable in parliament upon a judgment in B. R. in an action of debt brought upon a recognizance in error. Burr. Rep. 4 pt. 1567—8.

But upon error in parliament of a judgment affirmed in

B. R. new bail is required. Salk. 97.

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New bail must be put in upon every new writ of error.

Ld. Raym. 840.

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As if on a judgment in C. B. error is brought in B. R. where the judgment is affirmed, and afterwards error is brought in parliament, the party must give a new recognizance, for the first does not include costs to be affessed in the

House of Lords. Salk. 97.

Formerly, upon error brought of a judgment in an inferior court of record, no bail was necessary, as not within either of the foregoing statutes: But now, by 19 Geo. 3. upon or by any writ of error or supersedeas thereon to be " fued for the reverfing of any judgment given in any in-" ferior court of record, where the damages are under ten " pounds, unless such person, in whose name the writ of " error shall be brought, with two sufficient securities, such " as the court [wherein fuch judgment is given] shall allow " of, shall first, before such stay made or supersedeas award-" ed, be bound unto the party for whom any fuch judgment is given, by recognizance to be acknowledged in " the same court, in double the sum adjudged by the for-" mer judgment, to profecute the faid writ of error with " effect; and also to satisfy and pay [if the said judgment " be affirmed, or writ of error be nonproffed] all and fingular the debts, damages, and costs adjudged; and all " the costs and damages awarded for the delaying of exe-" cution."

If a writ of error in B. R. on a judgment in C. B. is amended in B. R. new bail must be given to the amended writ in C. B. and the plaintiff below shall not take out execution for want of bail. Rafael v. Verelst. East. 16

Geo. 3. C. B. 2 Blackf. Rep. 1067.

### BAIL IN ERROR when to be put in, &c.

THE plaintiff in error has four days after the allowance to to put in bail; and the plaintiff in the action, during that time, ought not to take out execution.

Bail must be put in within four days after the writ of error allowed, or plaintiff may take out execution. King's

Rep. 142.

When bail in error is put in, notice thereof ought to be given to the defendant or his attorney; and if the defendant does not except to those bail within twenty days after such notice, they shall be allowed. Reg. Mich. 5 W.

& M.

If the defendant in error thinks the bail insufficient, he may at any time, within the twenty days, have a rule from the clerk of the errors for better bail; and after service of such rule, if those bail do not justify in four days, or better bail is not put in within that time, the defendant in error may sue out execution of his judgment below: But the writ of error still remains and may be proceeded in, the surfedeas to the execution only being taken away. Vide Ld. Raym. 840.

If a rule for better bail is served in vacation, the plaintiff in error has not time, of course, to perfect his bail till the next term, but ought to justify before a judge: and execution sued out for want of it, was held regular.

Barnes, 211.

Bail in error, who refuses to justify, may have his name flruck out of the bail-piece at any time. Jones v. Tubb, in

error in B. R. 1 Wilf. 337.

Objection to one of the bail in error in C. B. that he was a palace court officer, but overruled and bail allowed. The rule of this court to prevent Sheriff's officers, and others concerned in the execution of process, from being bail, extends only to process of this court, wherein defendants having been bailed by the officers who arrested them, were greatly imposed on and abused. Barnes, 99. But this case was afterwards overruled. Ibid. 110.

After error allowed and notice, plaintiff in the judgment executed a fi. fa. for want of bail in four days. Motion to fet aside the fi. fa. suggesting that plaintiff could not regularly take out execution till after certificate from the clerk of the errors, that no bail was put in. Rule discharged. Such certificates have been frequently taken out of caution but are not essentially necessary. The stat. 16, 17 Car. 2 is positive as to bail within sour days. No bail is yet put

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### BAIL IN ERROR when to be put in, &c.

in. Bail ought to have been put in before the motion. A question arose, whether, after bail persected, the goods can be restored? In Meriton v. Stevens, Mich. 16 Geo. 2. and Sykes v. Dawson, Hil. 18 Geo. 2. held, that if defendint's person be taken by a ca. sa. and bail in error afterwards persected, the person shall be discharged: But in take of a st. sa. the proceedings, so far as the Sheriss has some, must stand. Incledon v. Clark. Barnes, 212.

Bail in a writ of error, cannot surrender their principal indischarge of themselves; for the condition of the recognizance is, that the plaintiff in error shall prosecute his writ with effect; and, if judgment be affirmed, shall satisfy and my the debt, damages, and costs recovered, together with sich costs as shall be awarded by occasion of the delay of execution; or else that they, the bail, shall do it for him.

The recognizance of bail in error in C. B. has not the midition incorporated with it, as with a recognizance of hil on a capias ad resp. but is subscribed by way of defeasance hit. Therefore a size sacras setting out the recognizance

with Therefore a fcire facias, setting out the recognizance, without the condition was held good, on an issue of nul tiel mord pleaded to it. Malland v. Jenkins. Barnes, 93.

If defendant in error excepts to the bail, and they give sice of justification, he must not give a rule to transible before they have justified.

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Of proceeding in Error from the Court of Common Pleas into the King's Benen, and herein of transmitting the Record.

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WHEN the writ is allowed by the clerk of the errors, and bail put in, according to the foregoing statutes, if the record is not brought in, the defendant in error may take out and serve the plaintiff with a rule to transcribe, who must, upon service thereof, give instructions to the clerk of the errors to make up the transcript, who does it by the following times.

If the writ of error upon a judgment in C. B. is made returnable the first return of term, the clerk of the errors does not bring in the roll till the last day of that term.

If it be returnable on any other return of term, he does not bring it in till the first day of the subsequent term,

If, upon a rule given, the plaintiff in error in B. R. doe not affign errors, and certify the record within eight days he will be nonfuited.—But the writ cannot be nonproffer without a rule to affign errors. Burr. Rep. 4 pt. 1772.

The rule to transcribe the record was served on plaintiff in error, and for want of transcribing a nonpros, was signed Plaintiff in error moved to set aside the nonpros, insisting, that the rule to transcribe ought to have been served on his known attorney in the cause, and not on plaintiff himself and obtained a rule to shew cause, which was discharged, the court declaring the service sufficient. Rules to transcrib are excepted out of the general practice. Service thereof on the party has always been held good. Green v. Upton Barnes, 410.

In error of a judgment in C. B. into B. R. a mittitur written on the roll, and the record itself in all cases [except in error on a fine levied there] is transmitted int B. R. 1 Rol. Ab. 752. l. 45. F. N. B. 20. F. Stra. 837-

And the reason why the transcript only of the recon upon error on a fine is transmitted, is, that in case judgment is affirmed, B. R. has no chirographer, nor can it ho plea in a quid juris clamat. I Rol. 752. l. 50. Dy. 89. b.

When the record is brought in and filed in the office the chief clerk with Mr. Heberden, the parties take copie thereof, and the defendant in error may sue out a \* sci facias quare executionem non; and if nihil is returned then

Vide the nature and form of these writs ante, under til

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of transmitting the Record.

to, he may have an "alias." Which writs must have a fifteen days between the teste and return, if the proceedings were by original, and be made returnable on a general return—If by bill as against attornies in C. B. on a day certain in term ubicumque.

After the record removed into B. R. from C. B. by writ of error, defendant died. Plaintiff moved in C. B. for lave to fue out his fci. fa. against defendant's executors, and in shewing cause the rule was discharged. The record being removed out of this court, the motion is improper here. Barnes, 206.

After a transcript from C. B. into B. R. the sci. fa. quare a non, should go out of B. R. So should the sci. fa. ad aud. errores. Barnes, 432.

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of Non-Prossing the Writ.

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If the record be brought into B. R. by the effoign-day of the term, the writ of fire facias quare, &c. may bear teste the last day of the preceding term; and if brought in within the term, it may be tested the first day of the term.

Note: That a fci. fa. quare, &c. may be prayed and fued by one executor, upon a writ of error brought upon a judgment for him and another, without shewing that the other

executor is dead. Burr. Rep. 4 pt. 1791.

If two nihils are returned to the scire facias quare, and alias; or scire seci is returned, and the plaintiff in error does not assign errors; the desendant in error may get a rule from the master [by whom all rules in error in B. R. after the record transmitted and before argument thereon are given] for the plaintiff to assign errors. Upon entering of which rule with the clerk of the rules, and serving a copy thereof on the plaintiff in error's attorney, if errors are not assigned within four days, the desendant in error may non-pross the writ of error, and shall have his costs, according to the statute 8 & 9 W. 3. c. 11. But without such rule to assign errors, a writ of error cannot be non-prossed. Leith v. M. Farlan, Burr. 4 pt. 1772.

A rule to affign errors was set aside, because given before any rule on the sci. fa. quare executio. non. Stra. 917.

The court will not grant over of this scire facias, or allow any plea to it, save an affignment of errors. Mich. 5 Geo. 2 B. R. Miles v. Wolsham.

A scire facias in error need not lie in the Sheriff's office four days before the return of it, as a scire facias again bail must. Gross v. Nash. Burr. Rep. 4 pt. 2439. Milla

v. Yarraway. Ib. 1723.

Error brought, and defendant in error took out a sci. sa quare, &c. to which the plaintiff in error pleaded, that the damages recovered were levied by a si. sa. And on motion the plea was set aside, as it evidently tended to delay; and this writ is only used as a method to bring the party to a sign errors. Stra. 679.

<sup>\*</sup> The form of a non-profs, vide ante under title, " Of proceed ing in Error from inferior courts."

Of preceeding in Error from the Court of Common Pleas into the King's Bench, and herein of Non-Prossing the Writ.

A sci. fa. ad aud. errores is not well brought before the record of the judgment be certified into the court, to reverse which the writ of error was brought, and errors affigned thereupon: for there is no record in court to warrant the granting of the sci. fa. before the record of the judgment is certified, and errors thereupon assigned.

If the first writ of error is non-prossed, and then another brought, the court on motion will give leave to take out exe-

cution. King's Rep. 243.

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Rule to shew cause why non-pros of a writ of error, for want of transcribing the record, should not be set aside with costs. Objected, that no final judgment is entered, and therefore no transcript could be made. The non-pros ordered to be set aside, but without costs. It appeared that the clerk of the judgments was paid his see, by plaintist's attorney, for entering the final judgment, which he had neglected to do; but plaintist did not pray any rule against him. Stone v. Rawlinson in Error. Barnes, 195.

In ejectment, verdict was for plaintiff; whereupon defendant brought error, and entered into a recognizance to pay costs in case of nonsuit, discontinuance, or affirmance, pursuant to the 16, 17 Car. 2. c. 8. s. 3. and it was held, that when plaintiff in error is nonsuited, defendant need not bring a scire facias or debt on the recognizance, but may sue out an elegit.

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Short v. Heath, B. R. Mich. 12 Geo. 2.

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

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If the court of C. P. upon a writ of error do not certify all the record, and the plaintiff in error alledges diminution, or aligns for error, that there is no original, or warrant of attorney, and prays a certiorari; the defendant in error may immediately get a rule from the master to return the certiorari, and serve the plaintiff's attorney with a copy thereof; and if it be not thereupon returned and filed in the office within four days, the defendant may join in nulls est erratum, and enter on record a non misst breve, and proceed to argument, as in cases of demurrer.

Where the want of an original is assigned for error, the plaintiff in error mult sue a certiorari, unless the defendant

in error confess it. Salk, 267,

The case was error of a judgment in C. P. after a verdict. Want of original assigned for error, but no certiorari taken out to get the want of the original certified. In nullo eft erratum pleaded. And when the cause came on in the paper, it was objected, that there ought to have been a certiorari, and a certificate made of the error; for it might be, that there was an ill original, and if that were returned, the plaintiff in error might take advantage of that, and that would not be helped by verdict, though the want of an original were, Per Holt, ch. just. If the want of an original be affigned for error, and the plaintiff in error does not take out a certiorari, and get a return to it, and the want of an original certified; the course is for the defendant to go to the master of the office, and get a rule for the plaintist in error to return his certiorari; and if he does not get it done, as ordered by the rule, the affignment of error stands for nothing. the defendant in error will come in gratis, and confess the error, there need be no certiorari returned. And as to the matter, that there might be a bad original, &c. that is another fort of error; and when the want of an original is affigned for error the court will never intend, that there is a bad original, and judgment was affirmed. Smith and others y. Stoneard, Ld. Raym. 1156.

But an original returned by one not Sheriff, is not affignable for error. Salk. 265.—And irregularity in the return thereof must be complained of the same term. Ibid.

Want of original was affigned for error, the defendant, before the return of the certiorari, came in gratis and pleaded

Of proceeding in Error from the Court of COMMON PLEAS into the KING'S BENCH, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

a release in bar, to which plaintiff demurred and defendant joined. Per cur. The release is mispleaded for want of a venue, and it was agreed, that the court could award, ex officio, certiorari ad informandum conscientiam, whether there was an original or not .- Sed Holt, cont. Vide Salk. 268.

So the court can ex officio award a certiorari to supply a defeet in the body of the record, even after in nullo est erratum

pleaded. Salk. 270.

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If a variant original is returned on the first certiorari, the defendant in error may sue a second certiorari. Salk. 266.

Continuances cannot be returned upon the same certiorari

with the original. Salk. 269.

If upon error, diminution, want of original, warrant of attorney, &c. is alledged, and a certiorari is fued out, upon which a record is returned contrary to what is before returned, it cannot be received. Vide the case of Tysoun v.

Hylyard, 2 Ld. Raym. 1122.

If error be affigned in the original, and upon a certiorari granted an erroneous original is returned; and upon this, in mullo eft erratum is pleaded; and after the court, ad informandum conscientiam, grant another certiorari for another original; and upon this a good original is certified; the court ought to intend that this is the original upon which the judgment was given, in favour of judgments, which ought to be intended to be good. Cro. Car. 91. Style 176. 2 Rol. Rep. 362. Godb. 407. Rol. Ab. 765.

An original writ of the term wherein final judgment is given, will not warrant that judgment, if it appear upon the ame record, that there have been proceedings of a preceding term.—But the plaintiff below ought to have an original writ of the term the placita is of. Dyke v. Sweeting, I

Wil. 181.

If a certiorari be prayed to certify an original, or a warrant of attorney of a wrong term, and the chief justice, or the suffes brevium return, that there is no original or warrant of that term, the defendant in error may make a suggestion of the right term, and pray a certiorari; which, when returned and filed, he may join in nul'o est erratum, and enter it on the roll, paying the plaintiff's attorney 25, 4d. for it. and for error the definition of the definition of the state and pleased

Of proceeding in Error from the Court of COMMON PLEAS into the KING'S BENCH. and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

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Want of original was affigned, certiorari prayed, and return no original; afterwards the defendant applied to chantery; and upon affidavit, that instructions were given to the curfuer for an original, but they were loft, the court of chancery allowed, that the original should be supplied. Upon which the defendant in error prayed another certiorari, and an briginal was certified of the fame term in which the default of an original was certified before; on which it was moved, that this was irregular; for, before the second certiorari was returned, the defendant ought to have given a copy of the original to the plaintiff's attorney; but the mafter informing the court, that the course was so when the second original certified was of another term, but not when it was of the fame term, the motion was difallowed, Com. 118.

The plaintiff affigned for error want of an original, and the defendant thereupon did not give a rule; but, at his own proper charges, took out a certifrari, and procured a certificate of an original. Sed per cur. This is ill, for the error is not compleatly affigned until the certificate is returned, by which it appears, that there was no original in the caule.

Com. 115.

Diminution cannot be alledged upon a writ of error brought upon a judgment in any inferior court.—But it may, upon error, in Wales and counties palatine. Sid.

So it may upon error of a judgment before justices of oper

and terminer. Sid. 40.

But if on a certiorari upon a writ of error it be certified, that the judgment was quod defend, fit in mifericordia, the defendant, in the writ of error, cannot alledge diminution: that the record is quod capiatur, because that is contrary to

the record certified. Rol. Abr. 764.

precedent term. In a writ of error in B. R. on a judgment in C. B. the want of warrant of attorney being affigned for error, the plaintiff prayed one certiorari to the chief justice, and another to the cuftos brevium; both of whom returned non inveni aliquod warrant'; and the defendant dying, the plaintiff, by journies accounts, brought a new writ of error against the fon and heir of defendant; who appearing, alledged diminution, in that the warrant of attorney was not certified, and hefferit

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

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prayed another certiorari to the custos brevium; and it was urged, that the return was not quod non babetur, &c. but quod non inveni, &c. so that if upon the second a warrant should be returned, it would not be repugnant: But it seemed to Wray, ch. just. That it would be hard to grant a new certiorari in this case; for though if any variance could be alledged, it would be otherwise, as was adjudged in the case of one Lassells, where it was certified there was no warrant, and because the original was inter Lassells execut' testamenti, &c. where he was not named executor in the first certiorari; and upon the matter a new certiorari was granted. Leon. 22. Vide Gro. Jac. 277. and Bulstr. 21.—Where to the first it was returned, there was no warrant of attorney in that term wherein the action was commenced, and a second certiorari was awarded \*.

Error of a judgment from C. P. on a judgment by default, the error affigned was, that there was no warrant of attorney for the defendant, (the now plaintiff) entered on the record below. It was objected that a man shall not take advantage of his own neglect in not making proper entries. To which it was answered, that in judgment by default, the plaintiff is to make up the whole record, and therefore it is his own laches. But the court ordered the cause to stand over, till the court of Common Pleas could be moved to amend the record, and afterwards the chief justice of C. P.

an original of that term will warrant the same, but not otherwise. 1 Keb. 327. Booth v. Beard. But an original of the term sinal judgment is given will not warrant that judgment, if it appear upon the same record, that there have been proceedings of a precedent term. Duke v. Sweeting, 1 Wilf. 181.

The case of originals differs from warrants of attorney; for it is sufficient if a warrant of attorney be filed at any time pending the suit, let it be which term it will. The stat, of Hen. 8. only requires a warrant of attorney to be filed in the cause: and the 4 Ann. requires it to be filed according to the course of the court; and that is, to have it filed any time pending the suit; but it is otherwise as to an original writ, for if there be proceedings in the action in a term preceding the return thereof, the original of a term after will not support them.

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

directed a proper warrant of attorney to be filed and entered, and thereupon a new certiorari issued, and the judgment was affirmed. French v. Cornelys. 1 Blacks. Rep. 453.

After in nullo est erratum pleaded, no diminution can be alledged, either by the plaintiff or defendant in error, with-

out leave of the court.

Error, upon a fine in C. B. and error affigned in the proclamations, upon which a certiorari went to the custos brevium, who certified, that two of the proclamations were made in one day; but it appearing in the Chirographer's office, that the proclamations were duly made, and he being the principal officer as to them, and the custos brevium having only an abstract thereof: upon the prayer of defendant a new certiorari was directed to the Chirographer, who having certified the proclamations duly made, after examination of the clerks of C. P. by the justices of B. R. they awarded that the proclamations with the custos brevium should be amended, according to those in the custody of the Chirographer.

3 Leon. 106.

Attorney and his wife fued by writ of privilege, and had judgment by default, on which error was brought in B. R. and want of a writ of privilege affigned for error. A certistrari was taken out to make good the error, but was not returned. And the court were of opinion, that if this fuit was by writ of privilege, it was ill; but they held that it does not sufficiently appear to them, that it was by writ of privilege: for the recital in the declaration is not sufficient for them to found a judgment upon; but the writ of privilege ought to have been brought before the court, by return to the certiorari, and therefore judgment was affirmed. Drew &

Ux. v. Rofe. Ld. Raym. 1398.

Error of a judgment in C. P. after verdict in a suit against an attorney. General errors were affigned. And the plaintiff in error insisted that all actions in C. P. must be either by original writ, original bill, or attachment of privilege. But this action does not appear to have been by any of these ways, for which reason the proceedings were irregular, and therefore he prayed judgment. Sad per cur. This being before us by writ of error, we cannot take notice whether there was any original bill or not, the defendant

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

dant being fued as attorney, it not being affigned for error that there was no original bill. But in order to have taken advantage of this, the plaintiff in error should have affigned for error, that there was no bill, and took out a certiorari, and got it returned that there was none. Judgment affirmed.

Graddell and others v. Tyfon, Ld. Raym. 1441.

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In error, the tefte of a writ of certiorari, by mistake, was made in the 13th year of our Lord, instead of our reign. On motion for leave to amend, it was doubted whether the court had power to amend fuch a writ or not. In support of the amendment, the statutes 8 Hen. 6. and 14 Edw. 3. and the case of Brooke and others v. Cooper, in Trin. 6 Geo. 2. to hew that the teste of a writ of enquiry, out of term, was amended; and an anonymous case in 3 Vent. 171. and Blackmor's case in 8th report, were cited. For defendant it was infifted, that this was fuch a writ as could not be amended; and I Lev. 2. was cited to shew, that no original writ can be amended; and that the teste of a writ of error is not amendable was cited 5 Geo. c. 13. In reply it was faid, that this is not an original, but a judicial writ, therefore amendable by all the statutes. But while the court took time to consider, the amendment, by consent of the parties, was ordered on payment of costs. Masters v. Buck. Barnes, 12.

On error of a judgment in affumpfit, by nil dicit in C. B. and writ of enquiry executed, and final judgment, plaintiff in error affigned the general errors, and also that that there was no writ of enquiry, or inquisition taken, filed, and remaining upon record in C. P. and prayed a certiorari directed to the cuftos brevium. To which he returned, that there was no writ of enquiry, &c. upon which defendant in error suggested, that there is a writ of enquiry in the custody of the cuftos brevium of the Common Pleas, of such a term affiled, and prayed a certiorari. To which the custos brevium returned, that upon search he found the writ of enquiry, &c. and then defendant set out the writ of enquiry, &c. which warranted and agreed with the record. And thereupon pleaded in nullo est erratum. And for the plaintiff, it was infifted that judgment ought to be reverfed, because the custos brevium could not return a fact upon the second certiorari in every particular, contrary to his return upon the

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Of proceeding in Error from the Court of COMMON PLEAS into the KING'S BENCH. and herein of alledging Diminution, Want of Original, Warrant of Attorney, &c.

And the court cannot tell to which return to give credit. Sed non allocatur. For there being a politive return of a writ of enquiry, which warrants the record, we will take that to be true. And judgment was affirmed. Shipman v. Lethieullier. Ld. Raym. 1476.

The defendant in error may have a fecond certiorari, but

plaintiff in error cannot.

The plaintiff in error took out a certifrari of a wrong term, which did not verify his error; and now he moved for s fecond certiorari, which was denied. The court faying, it may be granted to affirm, but not to reverse a judgment.

Merryfield v. Berry. Stra. 765.

Plaintiff brought a writ of error upon a judgment against him in C. P. by nil dicit; and affigned in Trinity term the want of an original, and the want of a warrant of attorney; and one certiorari was directed to the chief justice as to the warrant of attorney, and another certiorari to the cuftos brevium as to the original, which bore teste the 21st of June, (which was before the errors were assigned) upon which the custos brevium returned that there was no original, &c. The defendant pleaded in nulls oft erratum. And judgment was affirmed nift, because the plaintiff in error ought to take out a certifrari to verify his error that there was no original; but this certiferari bearing teste before the affignment of the errors, could not be a certiorari upon that affignment of ertors. Bowers v. Mann. Ld. Raym. 1554. Stra. 819.

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10 and that judgment curint to be reserved, cecause the when beginning could not neutrin a faith and the legel diese.

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Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of affigning Errors, Joinder, &c.

THE affignment of errors by the plaintiff ought to be in the fame term in the record is removed. Lutw. 354. F. N. B. 20 G.

Otherwise the defendant may non-pross the writer after a sei. facias quare, &c. and alias returned nihil, and a rule thereon given to assign errors, which vide ante.

The errors affigned must be signed by counsel, and must be affigned in term, and not in vacation. Prac. Reg. 203.

And must be assigned upon the record.

Of assigning errors, and of joinder in error, vide ante under title, "Of Proceeding in Error from inferior courts, &c." Upon the joinder in error, either party may move for a concilium, and set the cause down with the clerk of the

papers for argument.

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After the plaintiff has assigned errors, he may have a scire facias ad audiendum errores—but such writ is now seldom sued out, as the defendant appears usually gratis; or the plaintiff in error, after his assignment of errors, takes a rule out for the desendant to appear thereto, and serves a copy thereof on the desendant.

Two days at least before the cause comes to be argued, paper-books must be delivered to the judges. 2 Jac. 2. though that rule of court says four days before, yet the practice has been for a long time past to deliver the paper-books

only two days before.

The plaintiff in error delivers paper-books to the chief juftice and the fenior judge—the defendant to the two junior

judges.

The court will not hear arguments unless books be delivered to all the judges; therefore it behoves the attorney who expects the judgment of the court to be for his client, to deliver all the books, especially as he will be allowed in his costs for the copies he makes for the other side. Mich. 17 Car. 1.

The court has refused to hear any argument on the side of the party who hath neglected to deliver books, though he has

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been willing to pay the other fide for them.

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of the Judgment, &c.

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IF a judgment be below for the plaintiff, and error is brought, and that judgment reversed; yet, if the record will warrant it, the court ought to give a new judgment for the plaintiff. Cro. Car. 443. Salk. 401. Hob. 104.—But if the judgment be erroneous, and against the plaintiff, that ought to be reversed, and no new judgment given for the plaintiff. Ibid.

If any erroneous judgment be given for the defendant, and that is reversed, and the merits appear for the plaintiff, he shall have judgment—But if the merits be against the plaintiff, the defendant shall have a new judgment. So it is in the exchequer chamber, for they are to reform, as well

as to affirm or reverse it. Ibid.

But in Salk. 262. it is laid down, that where the plaintiff brings the writ of error, and the court reverses the judgment below, they give a new judgment for the plaintiff; but otherwise if the desendant below brings the writ of error, for then they only reverse it. — So in Burr. Rep. 4 pt. 2156. If error is brought by the plaintiff below, the court upon the reversal of the judgment, may give such judgment as the court below should have given: but if error is brought by the desendant below, the court can only reverse it.

And per Lord Mansfield, in Cuming v. Sibley, Burr. 4 pt. 2490. Where the plaintiff below brings a writ of error, we may not only reverse what is wrong, but give judgment for what is right. Where the defendant below brings a writ of error, we only reverse such wrong part of the judgment as

he complains of.

A judgment cannot be reversed in part, and affirmed in part, unless part is by common law, and part by statute. Salk. 24.—As where in assumption and two several counts laid, one on a promissory note, on which plaintiff had counted as on a bill of exchange upon the custom of merchants. Non assumption was pleaded, entire damages given, and judgment accordingly. And on error brought in B. R. it was held:

1. That plaintiff could not declare on a promissory note, as on a bill of exchange, and as there could be no such count or action, so there could be no such damages. 2. That they could not reverse the judgment in part, viz. As to one count, and affirm it as to the other, and denied the case of faceb

Of proceeding in Error from the Court of Common Pleas into the King's Bench, and herein of the Judgment, &c.

Jacob v. Mill. Hob. 6. And took the difference above, viz. Where the judgment is partly by the common law, and partly by statute, it may be reversed in part; for that which was a judgment at common law, will remain a judgment, and be compleat without the other.

If any anticous within a be given for the defendant, and that it reverted and the new is appear for the plaining the limit between the service he regainft the plaining the result of the plaining the service has a summer of the plaining the result of the plaining that the service has a service of the servi

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recall below read over a new judgment for the plaintiff; our contracts are so, which with below brings the writ of surely for then they had been some R = 50 in sure. Reserve R = 100 in the surely had been supported by the filter of the surely had been supported by the filter of the surely had been supported by the supported by

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# Of proceeding in Error by a Plaintiff to reverse his own Judgment.

If a plaintiff having obtained judgment below, brings a writ of error to reverse his own judgment [which is nothing strange or unreasonable where it is given for a less sum than he has a right to demand] the common method of bringing a scire facias quare executionem non would be improper, so would his suing out a scire facias ad audiendum errores.—Therefore if such plaintiff in error will not proceed after his writ of error brought, the court of B. R. may and ought to make a rule to oblige him to assign errors within a limited time; which rule the court will make upon the plaintiff in error, to assign errors within four days, or else that his writ of error shall be non-prossed. Johnson v. Jebb, Burr. Rep. 4 pt. 1772.

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# Of proceeding in Error from the King's Bench into the Exchequer-chamber.

As no writ of error lay of a judgment in the King's Bench but in parliament, and as the subjects were often disappointed of their writ of error by the not sitting of parliament, or by their being employed in publick business when

hey did fit :

By the 27 Eliz. c. 8. it was enacted, "That where any judgment shall, at any time hereafter, be given in the faid court of the King's Bench, in any fuit or action of debt, detinue, covenant, account, action upon the case, ejectione firma or trespass, first commenced there [other than such only where the queen's majesty shall be party] the party plaintiff or defendant, against whom any such judgment shall be given, may at his election, sue forth out of the court of Chancery, a special writ of error to be devised in the said court of Chancery, directed to the chief justice of the faid court of the King's Bench for the time being, commanding him to cause the said record, and all things concerning the faid judgment, to be brought before the justices of the Common Bench, and the barons of the Exchequer into the Exchequer-chamber, there to be examined by the faid justices of the Common Bench, and barons aforefaid; which faid justices of the Common Bench, and fuch barons of the Exchequer as are of the degree of the coif, or fix of them at the least, by virtue of this present act, fall thereupon have full power and authority to examine such errors as shall be affigned or found in or upon any such judgment; and thereupon to reverse or affirm the aid judgment as the law shall require, other than for errors to be affigned or found for or concerning the junisdiction of the said court of King's Bench, or for any want of form in any writ, return, plaint, bill, declaration, or other pleadings, process, verdict, or proceeding whatfoever; and that after the faid judgment shall be affirmed or reverfed, the faid record, and all things concerning the same, shall be removed, and brought back into the aid court of the King's Bench, that such further proceeding may be thereupon had, as well for execution as otherwife, as shall appertain."

This statute only gives the party his option in such cases,

bringing his error in Parliament or the Exchequer.

The Exchequer-chamber, under this statute, hath nothing do with errors in fact. 2 Lev. 38. I Vent. 207. 2 Mod.

Of proceeding in Error from the KING's BENCH into the Exchequer-chamber.

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The writ of error can only be returnable in the exchequerable in the feven cases mentioned in this act, where the suit was first commenced in B. R. Therefore if a suit is by original in B. R. a writ of error on a judgment thereon must be returnable in parliament, and cannot be in the Exchequerable abanber, because such suit is not commenced there, but in Chancery, where the original writ is purchased.

A writ of error therefore can only be returnable on judgments in B. R. in actions of debt, detinue, covenant, account, action on the case, ejectment, and trespass, first commen-

ced in B. R. which must be by bill.

But if a plaintiff in B. R. be nonsuited, and there is a judgment against him for costs, error lies in Cam Scace.

Stra. 235.

Though the words "action on the case" are general, and seem to comprehend every action on the case, yet it hath been held, that this statute does not extend to the action of scandalum magnatum, although that is an action upon the case: so that error thereon does not lie in Cam. Scacc. by force of this statute of Elizabeth. For the statute of scand. mag. 2 Rich. 2. c. 5. was made for the preservation of the publick peace; and besides, an action thereon, is of an higher nature than an action upon the case, being sounded specially on a statute. Vide Cro. El. 142. Ld. Raym. 954.

This writ of error is obtained of the cursuor in like manner as all other writs of error are;—and by Reg. East. 36 Car. 2. Every attorney who shall sue out any writ of error on any judgment of this court returnable in the Exchequer-chamber, shall forthwith allow such writ of error with the clerk of the errors of this court for the time being, and no

execution shall be stayed until such allowance.

And where special bail is required, if the plaintiff upon such writ of error does not within four days after the allowance thereof put in special bail, the plaintiff in the action may proceed to take out execution, notwithstanding such writ of error. Same rule.

If special bail is put in, the plaintiff in error, or his attorney, must forthwith give notice thereof to the defendant in error, or his attorney; and if the defendant in error does not except against such bail within twenty days after such notice, such bail shall be allowed. Mich. 5 W. & M.

#### Of proceeding in Error from the King's Bench into the Exchequer-chamber.

The record itself is not transmitted from the King's Bench into the Exchequer-chamber, as it is from the Common Pleas into the King's Bench in cases of error, but only a transcript thereof; and all the rules, until the making up and delivering over the transcript, are given by the clerk of the errors [Mr. Way]: But after delivery of the transcript, all rules, &c. are given by the clerk of the errors of the Exchequer-chamber.

When the plaintiff has affigned his errors in the Exchequerchamber, that court does not award a fcire facias ad audienlum errores, but notice is given to the parties concerned.

1 Vent. 34. Vide Palm. 186.

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If the plaintiff in error, after errors affigned in the Exchequer-chamber, intends to argue the same, he must give ten days notice to the clerk of the errors there, before they shall be argued; and copies of the paper-book in error must be made and delivered by the parties—The plaintiff in error delivers books to the judges of the Common Pleas, and the lifendant to the barons of the Exchequer. East. 33 Car. 2.

On judgment in error in the Exchequer-chamber, a remittur of the transcript to the King's Bench is entered, and

the execution thereon issues out of B. R.

Upon a special verdict, the judgment was in B. R. for the defendant, which judgment was reversed in the Exchepur-chamber. Besides the reversal, that court gives a compleat judgment for the plaintist, viz. that he do recover.

Carth. 319. Ld. Raym. 10.

Judgment for defandant on demurrer was reversed in the Exchequer-chamber; and judgment that the plaintiff do recover, was given, &c. But because that court had not power to ward a writ of enquiry, it was sent into B. R. for the extention of that writ, and thereupon to give final judgment. Nide Carth. 319. Ld. Raym. 10. And authorities there cited.

If error is brought by many in the Exchequer-chamber, and some die, a remittitur should be entered to warrant ex-

trution in B. R. against the survivors. Carth. 236.

If a writ of error abates in Cam. Scace. or is discontinued, there must be a remittitur entered in B. R. for without such remittitur it cannot appear to the court of King's Bench, but that the writ of error is still depending in the Exchequer-thamber. But if it appears that a remittitur was entered, the court will not examine into the time of the entry. Carth. 237.

Cc 2

# Of proceeding in Error from the KING's BENCH into the Exchequer-chamber.

On a writ of error into the Exchequer-chamber, a frire facias ad audiend. errores was awarded, returnable on the 11th of May; and there being no such day of adjournment in Cam. Scacc. it was held to be a discontinuance; and that a writ of error quod coram vobis lies not in Cam. Scacc. which has its power by statute, and can only reverse or affirm the judgments of B. R. and remand to the King's Bench for execution; and when the plaintist in error there is non-suited, or the writ is discontinued, they have no more to do with it, for they have no record before them, but it remains in the King's Bench. And though several precedents were produced where writs of error coram vobis, &c. were allowed, yet, as those passed without debate, no regard was

paid to them. Cro. Fac. 620.

Error of a judgment in B. R. into Cam. Scace. infancy af. figned, and appearance by attorney below, defendant in error pleaded in nullo est erratum, and prayed the judgment to be affirmed. On argument, all the justices and barons agreed, that error in fact could not be affigned, nor was it examinable in the Exchequer-chamber; and that in nullo est erratum was in the nature of a demurrer to it, and that judgment ought to be affirmed; upon which it was moved, that the plaintiff in error might discontinue his writ, upon payment of costs, which was granted nist, and afterwards made absolute: But afterwards, upon affidavit that the costs were taxed, and had been demanded, and that the plaintiff in error refused to pay them, the rule for discontinuing the writ of error was discharged. The cause was again put into the paper, and the judgment affirmed. Roe v. Sir John Moore, Bart. Com. Rep. 507. art. Com. Rep. 597.
In trespass 3001. damages were recovered, and error was

In trespass 300 l. damages were recovered, and error was brought on the judgment in Cam. Scace. pending which, plaintiff brought an action of debt on the judgment; and by all the judges, except Keelynge, it well lies, for the record itself is yet in the court, and the writ of error is a

Supersedeas only. 1 Lev. 153.

A judgment in C. P. was affirmed upon a writ of error in B. R. and a fcire facias was brought on that judgment, and plaintiff obtained judgment. And it was held, that no writ of error lies thereon in the Exchequer-chamber, because the record was not in B. R. by bill, as the statute requires, but by writ of error. 3 Salk. 148.

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# Of proceeding in Error returnable in PARLIA-

THE court of parliament is the supreme court where anciently causes of great consequence, as between the magnates regni, were heard and determined. Hence the lords is the dernier resort to which a writ of error lies; and therefore, if a writ of error be brought of a judgment in the King's Bench into the Exchequer-chamber, and there the judgment is reversed, yet a writ of error lies of such judgment into parliament, and the lords may reverse such second judgment.

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So, a writ of error lies into parliament upon a judgment given in B. R. upon a fuit originally commenced there, even in those actions mentioned in the stat. 27 Eliz. c. 8. for that statute only gives the party an election in those actions to have the writ of error returnable in the Exchequer-chamber.

If the fuit is by original in B. R. in all cases, a writ of error is returnable in parliament; for the statute of Elizantly gives the party an option to prosecute error in the Exchequer-chamber in the seven actions therein specified, if such actions were originally commenced in B. R.

The writ of error is obtained of the cursitor as in other tases, and is made returnable, if the parliament is sitting, immediately; or, if the parliament is prorogued, then ad proximum parliamentum.

If error is brought on a judgment in B. R. the chief justice conveys the roll, with the transcript, to the House of Lords, and leaving the transcript there, takes back the roll. 4 Ins. 21. Dy. 375. a. I Rol. 753. l. 20. Cro. Jac. 341. Godb. 247.

Note: Error does not lie from the court of Exchequer into the House of Lords immediately, for the Exchequer-chamber interposes. Salk. 511. 4 Inst. 21. 31 Ed. 3.

When the transcript is brought in, a peer moves the house for a day to be given the plaintiff to assign his errors, which is accordingly ordered, and of which the plaintiff must take notice; otherwise, the transcript will be remitted. Upon the assignment of errors, the defendant joins issue in nullo est erratum, and thereupon another motion is made by a peer for their lordships to appoint a day for hearing the errors. On the day appointed, both parties attend with their counsel; but no more than two counsel will be heard on each side.

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#### Of proceeding in Error returnable in PARLIA-MENT.

To regulate the proceedings in error returnable in parliament, the lords have made feveral orders; and first, by Or-

do Dom. Proc. die Ven. 13 Dec. 1661.

Forafmuch as upon writs of error returnable in this high court of parliament, the parties therein often desire to delay justice, rather than to come to the determination of the right of the cause; " It is therefore ordered, by the lords spiritual and temporal in parliament affembled, that the plaintiffs, in all fuch writs, after the same and the records be brought in, shall speedily repair to the clerk of the parliament, and profecute the writs of error, and fatisfy the officers of this house their fees justly due unto them, by reafon of the profecution of the faid writs of error, and the proceedings thereupon; and further, shall assign their errors within eight days after the bringing in of such writs with the records; and if the plaintiff makes default so to do, then the faid clerk, if the defendant in fuch writs require it, shall record, that the plaintiff hath not profecuted his writ of error; and that the house do therefore award that such plaintiff shall lose his writ, and that the defendant shall go without day, and that the record be remitted: and if any plaintiff, in any writ of error, shall alledge diminution, and pray a certiorari, the clerk shall enter an award thereof accordingly, and the plaintiff may, before in nullo eft erratum pleaded, fue forth the writ of certiorari in ordinary course, without special petition or motion to this house for the same; and if he shall not profecute such writ, and procure it to be returned within ten days after his plea of diminution put into this bouse, then, unless he shall shew some good cause to this house for the enlarging of the time for the return of fuch writ, he shall lose the benefit of the same, and the defendant in the writ of error may proceed as if no such writ of certiorari were awarded."

And by Ordo Dom. Procer. die Martis, 19 Aprilis 1698.

The house taking notice, that upon appeals and writs of error, there have been of late feveral scandalous and frivolous printed cases delivered to the lords of this house; for preventing whereof for the future, It is this day ordered, by the lords spiritual and temporal, in parliament assembled, that no person whatsoever do presume to deliver any printed case or cases to any lord of this house, unless such case or cases shall be signed by one or more of the counsel, who attended

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## Of proceeding in Error returnable in PARLIA-

attended at the hearing of the cause in the courts below, or shall be of counsel at the hearing in this house: and this order to be added to the roll of standing orders, and affixed on the doors of this house, and the courts in Westminster.

And by Ordo Dom. Procer. die Mercur. 22 Dec. 1703.

Upon consideration of the great inconveniencies arising by motions and petitions for putting off causes after days have been appointed for hearing thereof; It is ordered, by the lords spiritual and temporal in parliament assembled, that when a day shall be appointed for the hearing any cause, appeal, or writ of error, argued in this house, the same shall not be altered, but upon petition; and that no petition shall in such case be received, unless two days notice thereof be given to the adverse party, of which notice oath shall be made at the bar of this house; and it is surther ordered, that this order be added to the roll of standing orders.

And by Ordo Dom. Procer. die Veneris, 21 Feb. 1717.

Ordered, that in all cases upon writs of error depending in this house, when diminution shall be at any time alledged, and a certiorari prayed and awarded before in nullo est erratum pleaded, the clerk of the parliaments shall, upon request to him made, give a certificate that diminution is so alledged, and a certiorari prayed and awarded thereupon. And it is surther ordered, that this order be entered on the roll of the standing orders of this house.

And by Ordo Dom. Procer. die Sabbatis, 2 Mart. 1727.

Upon report from the committee of the whole house, appointed to take into consideration matters relating to the proceedings on appeals, and writs of error; It is ordered, by the lords spiritual and temporal, in parliament assembled, that at the hearing of causes for the suture, one of the counsel for the appellant shall open the cause, then the evidence on their side shall be read, which done, the other counsel for the appellants may make observations on the evidence; then one of the counsel for the respondents shall be heard, and the evidence on their side to be read, after which the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply.

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#### Of proceeding in Error returnable in PARLIA. MENT.

A writ of error returnable in parliament, was discontinued by the prorogation; another writ was brought tested the last day of the session, viz. I March, returnable 19 Nov. the day to which it was prorogued. The court refolved, that though the first writ was not discontinued by any act of the party, yet the second writ should be no supersedeas.

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Vide I Vent. 31.

A writ of error tested 30 Nov. returnable in parliament the 30th of April next, the day to which parliament was prorogued. Per Hale, The lords have lately declared, that prorogation does not determine a cause depending in parliament by writ of error; but that comes not to this case, the writ not being returned. A writ of error returnable at the next parliament is not good; but otherwise if they are summoned or prorogued to a day certain. A writ of error bore teste 10 Nov. and returnable 1 Nov. next following, and the record was fent into the Exchequer-chamber, and a mittimus indorfed upon the roll here; and it was refolved, that execution might be taken out, because of the long return. 2dly, That though there were a mittimus upon the roll, yet the record remained here until the return of the writ to all purposes.—In the opinion of the court, the writ of error was no supersedeas; but they would make no rule, because not judicially before them; but that the party might take out execution if he thought fit; and then if the other fide moved for a supersedeas, they would resolve the point, 1 Vent. 266. 2 Lev. 120.

If a writ of error be brought in the Exchequer-chamber, and that being discontinued, another is brought in parliament, this fecond writ is a supersedeas. But if a writ of error be brought in parliament, and that abates, and the plaintiff brings a fecond, this is no supersedeas, because it is in the

fame court. I Vent. 100.

A writ of error does not determine by the prorogation of

the parliament. 2 Lev. 93.

Error of a judgment in B. R. for defendant into dom. Proc. and the judgment was reversed, and the record was remitted into B. R. whereupon the plaintiff moved B. R. for a new judgment. Per cur. A new judgment cannot be given here contrary to that which is already given; the same court which reversed must give a new judgment. Philips and Bury, Carth. 319. Ld. Raym. 9, 10. Įf

# Of proceeding in Error returnable in PARLIA-

If judgment below was given for the defendant, upon demurrer, and the judgment be reversed, whereupon a writ of enquiry becomes necessary, in such case, as the lords cannot award a writ of enquiry, the record is remitted to B. R. for them to award the writ of enquiry, and upon return thereof, then to give final judgment. Vide ibid.

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### Of proceeding in Error coram nobis, and Error coram vobis.

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TIS beneath the dignity of the House of Peers (that being the supreme judicature) to try matters of fact, and for that reason errors in fact of any judgments in the King's Bench must be redressed there, and not in parliament. Knoll's case. 3 Salk. 146.

But upon a judgment in criminal cases in B. R. error will lie in the same court, whether the error be in fact, or in law;

but it lies also in parliament. 3 Salk. 147.

So that if a judgment in B. R. be erroneous in matter of fact only, and not in point of law, a writ of error coram nobis residend may be brought in B. R. where the judgment was given, to reverse that judgment; for error in fact is not the error of the judges, and reversing it is not reversing their own judgment.

This writ of error is allowed in court by the fecondary, or it may be allowed in vacation by the fecondary.—And it is faid to be no supersedeas of execution without leave of the

court. Carth. 368.

The statutes requiring bail in error do not extend to this

writ of error.

When the writ is allowed, and notice thereof given, the defendant in error should move for a rule to compel the plaintiff to assign errors; upon service of which he must immediately assign errors. Upon the assignment of error in fact, if the error in fact is assignable and well assigned, the defendant may confess it. Salk. 268.—But a defendant can never confess error in law.

But if the error in fact is not well affigned, the defendant may plead thereto, upon which the parties are at issue in fact; and that must be tried by a jury. The record for trial is then made up the same as in other cases, and either party may carry it down; and in such case, if the issue is sound for the plaintiff in error, he must move to put the cause in the paper for argument, and then upon producing the postea the court will give judgment of reversal.

But if the error in fact affigned, is not affignable for error, then the defendant may join in nullo est erratum, which is in nature of a demurrer, and the same is argued in court as

in other cases.

Where matter of fact is infufficiently alledged, in nullo est erratum, is a demurrer.—So it is if matter of fact is alledged against the record. But if matter of fact is well set forth with matter of law, it is a demurrer as to the doubleness, but

#### Of proceeding in Error CORAM NOBIS, and Error CORAM VOBIS.

that must be specially assigned; or otherwise, upon in nullo est erratum pleaded, the matter of fact will be confessed, and the matter of law referred to the judgment of the court.

Error coram vobis, and infancy affigned, a scire facias ad audiendum errores, and scire feci returned; but defendant did not appear and join in error; on which plaintiff applied to know what to do. The court directed him to put it in the paper, without taking out any rule to join in error; and when it came on, the judgment was reversed. Thatcher v, Stephenson, Stra. 144.

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but that Error in C. B. infancy affigned. Doubt del court, and feigned issue, which was found for plaintiff in error, and the judgment was reversed on return of the postea, upon motion, without argument in the paper, but within a day or two after. Osborn v. Barrington, Stra. 127.

In F. N. B. 21. It is faid, that a judgment cannot the fame term it is given be reversed in B. R. without a writ of error, though a judgment in the Common Pleas may: but there seems no foundation for this distinction. Moor 186. pl. 332. Yelv. 157. Pop. 181. For during the whole term in which any judicial act is done, the record remains in the breast of the judges of the court; and therefore the roll is alterable during the term, as they shall direct. But when the term is past, the roll is the record, and admits of no alteration. Co. Lit. 260. a.

When a record is removed upon error brought from C. B. or other inferior court into B. R. and the same writ of error is quashed for any other fault than variance, error coram vobis lies in the same court to which the record is removed. Co. Ent. 289. I Stra. 607. and in such case such writ of error is the only writ that can be had. Ibid. Ld. Raym.

When errors are affigned, and afterwards that writ of error is discontinued, the plaintiff in error may have another writ quod coram vobis residend, and upon this new writ may affign other errors than those he affigned before, either within or without the record, and is not bound to the same errors.

This writ of error coram vobis recites the former writ of error, and must recite it accurately; for where such writ recited the former writ to be returnable coram nobis, where it

#### Of proceeding in Error CORAM NOBIS, and Error CORAM VOBIS.

was before the king, and the late queen, it was \* quashed. Ld. Raym. 151. Carth. 370. Sed vide of Amending Writs of Error, post.

This writ of error must be entered upon the same roll with the first, that the court may see all together. Cro. El.

155. 281.

If a writ of error, quod coram vobis, is brought after abatement or discontinuance of a writ of error quod coram nobis, no bail is requisite, because none was required in the writ of error coram nobis.

But if error coram vobis is brought upon discontinuance, &c. of a writ of error upon a judgment of C. B. or other inferior court, it seems new bail is requisite. Vide Carth. 369.

and Ld. Raym. 151.

If a writ of error once good, abates by plea or death, the inferior court cannot proceed; but the superior court and party may have a new writ quod coram vobis residet; but where the writ is ill, no new writ coram vobis can be had; as where the writ was to remove a judgment quod fuit in curia nostra, where it was in the time of a predecessor. Latch.

Error coram vobis lies not after an affirmance of a judgment, except in case of error upon a fine in C. B. after affirmance thereof in B. R. Salk. 337. although in this case of a + fine, the transcript is only transmitted into B. R.

upon error brought.

Error coram vobis does not lie in B. R. after error brought in Cam. Scacc. and judgment affirmed. Because, before the stat. of Eliz. B. R. could not examine its own errors in fact, after an affirmance in parliament; and the Exchequer-chamber is now in the same degree with regard to B. R. in

+ If on error brought into B. R. of a fine in C. B. and the fame is reversed, a certiorari goes for the foot of the fine, and it is cancelled in B. R. If it is affirmed the transcript is remitted

into C. B. because B. R. has no chirographer.

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But the writ was quashed for another reason, viz. that the writ of error was brought to defeat a judgment, and therefore it should not have a favourable construction; although in the same case it was insisted, that according to a grammatical construction, the relatives and verb being in the plural number, the clause would extend to the queen as well as the king.

#### Of proceeding in Error CORAM NOBIS, and Error CORAM VOBIS.

those cases within the statute, as the parliament was before, and is now. Vide Stra. 690.

Error coram vobis lies not in the Exchequer-chamber.

On a judgment on scire facias in B. R. defendant brought error coram nobis residend, and for error assigned matter of fact, contrary to the suggestion of the sci. fa.'s; upon which iffue being taken, and found for the plaintiff in error, the moved that the judgment might be reverfed. Per Holt, a writ of error will not lie in this case, but an audita querela only; because the fact affigned for error is in the suggestion of the writ itself, and not in any of the proceedings in the cause. Therefore adjudged that error did not lie, wherefore plaintiff brought audita querela. Lampton v. Collingwood. tres on which I enters ned corer, chares opice on molesia, in

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### Of proceeding in Error TAM QUAM.

A Writ of error tam in redditione judicii quam in adjudicatione executionis, is a writ of error brought by bail (after fcire facias against them, and award of execution thereon) of the judgment against them, and the execution awarded thereupon; for they cannot have error of the principal judgment. Vide Cro. Car. 481. 2 Leon. 101. Cro. Car. 561.

Nor can the bail join with the principal in error. Palm.

This writ of error recites the judgment against the principal, but alledges the error in the second judgment, and in the execution thereof to the damage of the bail.

For error in fact the bail are relievable by audita querela,

Yelv. 155.

Bail brought a writ of error tam in redditione judicii in the original action, quam in adjudicatione executionis. And it was quashed, because bail cannot have error on the principal

judgment. Carth. 447.

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After an award of execution against bail, on a recognizance in error, they brought a writ of error, as to such award of execution: the plaintiff moved for leave to take out execution for want of bail on the writ of error brought by the bail, and obtained a rule to shew cause; which was afterwards discharged, no bail in this case being required. Barnes, 194.

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Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

A Writ of error was not amendable at common law, nor by any of the statutes of amendments and jeofails, till the 5 Geo. 1. c. 13. for all amendments are granted for the support of judgments; but the principal design of writs of error is to reverse them. Ld. Raym. 71.

But by the stat. 5 Geo. 1. c. 13. it is enacted, "That all writs of error, wherein there shall be any variance from the original record or other defect, may and shall be amended, and made agreeable to such record, by the respective courts where such writ or writs of error shall be

" made returnable, &c."

No costs are to be paid on any amendment of writs of error, pursuant to this statute; but if the writ of error be quashed, the defendant in error shall have costs. Fitz-gib. 201.

If a writ of error is amended in B. R. new bail shall be given to the amended writ in C. B. and the plaintiff below shall not take out execution for want of bail. 2 Blacks.

Rep. 1067.

Of

Error of a judgment in C.B. in an action there by a feme sole. To the scire facias quare executio. non, the plaintiff in error pleaded in abatement, that the defendant in error was married since the judgment, and before the issuing of the scire facias; on which defendants in error moved to quash their own sci. sa. and the other side insisted upon costs. Per cur. It is the same in a scire facias as in an action, where you plead in abatement, and plaintiff's writ is abated, he pays no costs. Had there been no plea in abatement, and the party had moved to quash his own writ, we should have made him pay costs. The writ was quashed without costs. Pocklington v. Peck. Stra. 638.

A writ of error was returnable before any judgment given, and on confideration, it was held to be such a fault

as is not amendable by the 5 Geo. 1. Stra. 807.

There was a variance between the writ of error and the record; and as it flood in the paper the court observed it; but neither party would move to amend it, for fear of paying costs. Upon which the court faid the stat. 5 Geo. 1. 1. 13. would warrant their amending it, which they did

Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

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without costs. Gardner v. Merratt. Stra. 902. Ld. Raym. 1587. OF THE IN OTHER MADE SELT THE STEW TO

Error was brought by B. to reverse a judgment given against him in C. P. after verdict in ejectment, wherein he was defendant. The writ was tested 23. of Oct. and returnable in eight days of St. Martin in Mich. following. And by the record certified, the judgment appeared not to be given till Hilary following. Whereupon it was clearly held, that the record was not removed by this writ of error. Then it was moved, that the writ of error might be amended by the 5 Geo. 1. c. 13. but upon reading the flatute, the court were of opinion it could not be done; for it would be to amend the writ, contrary to the truth of the case, as the judgment, in fact, was not given till Hilary term; and therefore, this was not fuch a variance as was intended to be amended by that act. Ld. Raym. 1531. Stra. 807.

A writ of error cannot be qualhed till the transcript is

A writ of error was quashed because all the proper parties

were not plaintiffs. Ld. Raym. 71.

A writ of error tam quam may be quashed as to one judgment, and stand good as to another, if it should be brought for error in the principal judgment, as well as for error in adjudicatione executionis, which is wrong. Ld. Raym. 328.

Judgment was against A. and B. executors; a faire fieri enquiry was awarded, to which a devastavit against A. was returned; and upon that devaftavit judgment was given against A. upon which judgment, A. sued a writ of error without naming his co-executor to reverse the principal judgment, and also the judgment upon the devastavit against himself; and because he alone could not sue error upon the principal judgment, the writ of error was quashed as to that, and flood good as to the other part. Dalbid. ton all yatt

A writ of error of a judgment on a recognizance was quathed, because it was in adjudicatione executionis judici. Ld. Raym. 553. for it ought to have been in adjudicatione executionis super recognitionem. History in 1910 19 1910 19

So qualhed for variance in the stile of the court. Ld. the plaintill in error dies betere errors athgr.407 imen Mabates, and the defendant in error may fue out a Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

If one brings error without the other, who ought to joint with him, though the writ shall be quashed, yet the record shall be removed by it. Ld. Raym. 1403. Such writ cannot be amended; Ld. Raym. 1532. and in this case said, that the record is not removed by such bad writ of error.

Costs upon quashing writs of error are to be given in all

cases. Stra. 606.

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The court will not quash a writ of error on motion, though it appears to be brought twenty-nine years after the judgment, and the statute restrains the party to twenty years; because if they did, it would deprive the plaintiff in error of the benefit of replying to the exceptions in the statute.

Higgs v. Evans. Stra. 837.

Several judgments were against three executors, two of whom only joined in bringing error, and bad. 1 Will. 88.

No person can bring error to reverse a judgment, who was not a party or privy to the record, or who was not injured by the judgment, and therefore to receive advantage by the reversal. Rol. Abr. 747. Dy. 90.

So error does not lie against any but him who was party or privy to the first judgment, his heirs, executors or ad-

ministrators. Rol. Abr. 747. 9 H. 6. 46. &c.

If a writ of error abates by the act of the party, execution shall go. Stra. 1015. as where a writ of error brought by a feme fole abated by her marriage, and then she and ter hulband brought a second writ; the court gave leave to the out execution, it being a delay by the act of the plaintiff

If there are several plaintiffs in one writ of error, the seath of one abates the writ of error, because there cannot any judgment according to the writ; but if there are several desendants in error, and one dies, it is otherwise, for they are not named in the writ. Ld. Raym. 244.

A writ of error does not abate by the death of the defendint in error, Ld. Raym. 439. Salk. 246. but otherwise if the plaintiff die. Sir H. Thynne v. Corie. 1 Vent. 34. A scire luias ad aud. errores went against the executor, when the stendant in error died. Vide Barnes, 432.

If the plaintiff in error dies before errors affigned, the mit abates, and the defendant in error may fue out a facias

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Of quashing and amending Writs of Brror, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c. to atnome

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facias to revive the judgment against his executor, &c. But if he die after errors affigned, and a joinder in error, it does not abate the writ, and the defendant in error may proceed to get the judgment affirmed, but must then revive it against

the executor, &c. of the plaintiff in error.

After the record removed from C. B. into B. R. by writ of error, defendant died, and the plaintiff moved in C. B. for leave to take out a sci. fa. against defendant's executors. But on flewing cause, the rule was discharged. The record being removed out of C. B. the motion was improper in that court. Barnes, 206.

So a writ of error does not abate by the death of the defendant in error after in nullo oft erratum pleaded. Ld. Raym.

1295

vin B. K. thare: Entry of diffeifee, pending a writ of error, abates it. Ld. Raym, 476.—An abateable writ is abated as to a stranger. Ibid. Where a writ of error abates by motion, the court must

be moved to take out execution; but otherwise if for variance. Salk. 264. But now if the writ varies from the

record, &c. it is amendable by 5 Geo. 1. c. 13.

If a writ of error abates on discontinues by the act and default of the party, a second writ shall be no supersedent. Keb. 658. As if a plaintiff in error be nonfuit, he shall not have a writ of error again. Salk. 263. pl. 4. Ld. Raym.gs.

But if a writ of error abates by the act of God, or the law, a fecond writ of error will be a supersedeas. As where a writ of error abated by the death of the lord chief justice Foster, and a second writ of error was sued out and allowed, and it was held a supersedens. Keb. 658.—So a second writis a supersedens upon abatement of the first writ of error by death.

Three join in bringing a writ of error, the defendant pleads outlawry in abatement as to one of them; but the court held this no good plea, because they are all compellable

with of error by one alone, upon a mo. 151 and an inio of

Where two join in a writ of error, and one will not affigu errors, the court will give the other time to fummon and Sever. Stra. 783. For if judgment is given against two, both ought to join in error—but if one dies after judgment error may be brought by the furvivor without the executor of the other. Stra. 234.

Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

If one plaintiff assigns errors, he must do it in the name of all, except where the others are severed. Mod. Cas. 40.

If after a writ of error brought by two, and to a scire facias quare executionem non one only appears, summons and sever-

ance lies. Yelv. 4.

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A. fued B. in the Common Pleas in Ireland, and recovered A died, and his executors took out a scire facias quare ex. non, to which B. pleaded payment, and found against him. with 6d. damages; and the judgment was, that they should have execution of the debt and damages aforefaid, and alfo their costs and expences, &c. and for costs de incremento .- B. brought error in B. R. in Ireland, and only one of the executors appeared to the writ, who alone fued out the scire facias quare ex. non in B. R. there; and yet, that court affirmed the judgment of C. B. for both, and adjudged, that both should recover. On which B. brought error into B. R. here, and though - 1. Objection was taken that the court below had given damages for the non-payment, whereas damages cannot be given in a fci. fa. And 2. That the sci. fa. in B. R. in Ireland was prayed by one executor only, though the writ of error was brought against noo, and no suggestion that either is dead; yet B. R. in England affirmed the judgment. And as to the first objection they faid, " that the being damnified and put to costs to the amount of 6d. was only meant as a foundation for the costs de incremento; and the judgment is, that the plaintiffs hall recover 171. 14s. 8d. for their cofts and expences, To the second objection, The fci. fa. quare, &c. sonly a process to bring the plaintiff in error in to affign errors; and as he came in and affigned errors, he waived any objection, and admitted the one executor to be fufficient to call upon him to affign errors; and from this we are to prelume, that the other executor is dead: And though a writ of error by one alone, upon a judgment against two, is not good, it is upon account of the inconvenience that would anie from a perpetual delay of execution, if every defendant might bring a writ of error by himself; but that reason does not hold in this case, where the executors are defendants m error, and not plaintiffs. Knox v. Costello. Burr. Rep. 4 pt. 1789. Dd 2 In Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c. 18 alasm

In an action for flander, verdict was for the plaintiff as to one let of words, and for defendant as to the other. And on error from C. B. into B. R. the errors affigned were, that there ought to have been a judgment for defend. ant as to the words of which he was acquitted, that he might be able hereafter to plead acquittal in bar of another action; and that the plaintiff should have been amerced pro falso clamore as to so much. The court of B. R. thought the judgment insupportable, but allowed the defendant in error to move the court of C. B. for leave to amend the record by the verdict, which was granted on a rule to shew cause; and then B. R. amended the record which had been fent there, and affirmed the judgment. Smith v. Fuller. Stra. 786.

After error in Cam. Scace. from B. R. the transcript was brought back and amended in B. R. by the original record there; and it was held necessary to make the amendment in B. R. because this differs from the case of a writ of error from C. B. into B. R. for C. B. fends up the very record, whereas B. R. only fends the transcript, Rutter v. Redstone.

Stra. 837.

Plaintiff's attorney, after a writ of error brought artfully, delayed figning the final judgment till the writ of error was spent, and then brought an action of debt upon the judgment. The court ordered proceedings in the action upon the judgment to be stayed, and a new writ of error to be brought at plaintiff's attorney's expence. Arden v. Lamley. Barnes, 250. carried into the King's Bench

After error brought on a judgment against an executor de bonis propriis, and in nullo est erratum pleaded, and on argument thereon in Cam. Scace. it was moved in B. R. to amend the judgment by making it de bonis testatoris si, &c. et de bonis propriis fi non, &c. And the amendment was granted contrary to 1 Ld. Raym. 182. Short v. Coffin Exer. Burr.

Rep. 4 pt. 2730.

In debt upon a mutuatus, judgment was entered up as of Hil. 1700, whereas the borrowing appeared to be 2 April, 1701: Error being brought to reverse this judgment, defendant in error moved to amend the judgment by the paper-book figned by the master, which was the 2 Fan but

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Of quashing and amending Writs of Error, of Abatement, Discontinuance, Summons, and Severance in Error, and of amending Judgments after Error brought, &c.

2 Jan. 1700. Et per cur. It may be amended, for 'tis but a flip of the clerk, who should have pursued the paperbook figned by the matter, which is authentick enough to amend by. Parfons v. Sill. Salk. 51. Vide Cro. El. 147.

A judgment by non fum inform. was figned Dec. the 22, by virtue of a warrant of attorney, dated Oct. 31, in Mich. term; and the roll was filed generally of the faid Mich. term. Error was brought; and afterwards, plaintiff's attorney moved to amend the record, according to the fact, by inferting at the top of the roll from the day of St. Martin in fifteen days in Mich. term, &c. to prevent the judgment's having relation to the effoign day of the first return, which would have vitiated it; the day laid in the declaration on a mutuatus, being Oct. 31, (the date of the warrant of attorney) and upon hearing the attornies on both fides, in the Treasury in C. B. the amendment was ordered. Deacon v. Vivian. Barnes, 7.

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After error brought, and in nullo eft erratum pleaded in B. R. it was moved in C. B. to amend the judgment roll, by striking out, that the plaintiff ought to recover; and inferting, that the plaintiff do recover; which was ordered on payment of costs, provided that the defendant do not farther profecute his writ of error; but if he proceeds in error, then without costs. Foster v. Blackwell. Barnes, 7.

Rule to shew cause, why final judgment on verdict in C. B. should not be amended in particulars, after writ of error and record transcribed; but the transcript not The amendments were to carried into the King's Bench. infert words agreeable to the standing form used by the clerks of the judgments: some other little miltakes which were vitium clerici; and to make a juryman's name Marshall, instead of Marshall; by the panel, &c. to make the record confistent; on reading the postea, babeas corpora and panel. Barnes, 18. 2 22 .... A bil 1 of visitor

In debt upon a mittigue, judgment was entered up a of Hil 1700, whereas the borrowing appeared to be a

#### Df Faile Judgment. 406

Writ of falle judgment lies where an erroneous judge ment is given in any court not of record, in which the fuitors are judges. F. N. B. 18. a.

If there are no fuitors by whom the plaint may be certified, there shall not be falle judgment, as in a copyhold court; in which, upon an erroneous proceeding, the copyholder must sue to the lord by petition. F. N. B. 18. H.

A writ of false judgment upon a judgment in the Sheriff's court, is in the nature of a recordari. F. N. B. 18. A. B.

And upon a judgment in another court, not of record,

it is in the nature of an accedas ad curiam. Ibid.

A writ of false judgment may be sued by any one against whom judgment is given; his heir, executor, or admini-Arator, and dand men

Or by any one who has damages, though the other defendants do not join as they ought to do in error. R. Mod.

A writ of false judgment issues as a writ of error out of

Chancery, upon application to the proper curfiter.

Upon the return of the writ and the whole record certified, and not before, the plaintiff shall assign his errors. F. N. B. 18. I.

And he may have a scire facias ad audiendum errores, as in error. F. N. B. 18. F. G. Or now he may serve a rule as in cases of error.

Or, if the defendant has day by the roll, the plaintiff

may affign errors without a feire facias against him.

The writ of false judgment ought to be served in court. 6 Hen. 7. 16. a.

And being served, shall be a supersedeas to all proceedings below. 6 Hen. 7. 15. b.

Upon two fci. fa. ad aud. errores awarded, and nibils returned, or feire feei and default made, the judgment shall lovereign lord th be reversed.

If a writ of false judgment abates, or the plaintiff therein is nonfuited, the defendant shall have a feire facias quare executionem non. F. N. B. 18. G.

If upon falfe judgment brought, which ought to be ferved in court, and the lord refuses to hold his court, a distringas tenere curiam goes against him. 6 Hen. 7. 16. a.

When the parties are once in court, the subsequent proceedings in falle judgment are the fame as in error.

A writ of false judgment was delivered to the undertheriff, but no money was tendered or paid for the return; for want whereof, the Sheriff took no notice of it, and executed a writ de executione judicii. Upon hearing counsel

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on both sides, the Sheriff's proceeding was now held to be regular. Per cur. The defendant if he think sit, may proceed on his writ of sale judgment. Gale v. Hooker. Barnes, 199.

The form of a writ of false judgment and return into C. B. George the third by the grace of God of Great Britain, France and Ireland, king, defender of the faith, and fo forth. To the Sheriff of Berks, greeting. If C. D. shall give you fecurity that his fuit shall be prosecuted then in your full county, cause the plaint to be recorded, which was in the fame county without our writ between A. B. and the faid C. of a certain plea of trespass on the case done to the said A. by the said C. as it is said, wherein the faid C. complaineth that false judgment hath been given against him in the faid county; and have you the same record before our justices at Westminster, from Easter in re days under your feal, and the feal of four lawful knights of the same county, of such as shall be present at the said record and fummon, by good fummoners the faid A. that he be then there to hear the faid record; and have you there the names of the summoners and of the faid four knights, and this writ. Witness ourself at Westminster the of \_\_\_ in the 21st year of our reign.

By the lord chancellor of Great Britain, at the instance of the defendant.

By virtue of this writ to me directed in my full county held at Abingdon the 17th day of March, in the 21st year of the reign of our fovereign lord George the third, by the grace of God of Great Britain, France and Ireland, king, defender of the faith, and so forth. I caused the plaint to be recorded, which is in the same court, without the writ of our faid fovereign lord the king, between A. B. and C.D. in a certain plea of trespass on the case done to the faid A. by the faid C. as it is faid, wherein the faid C. complaineth, that false judgment hath been given against him in the faid county, which faid plaint appears in a certain schedule to this writ annexed; and I have the said record before the justices within written, at the day and place within mentioned, under my feal, and the feals of four lawful knights of the same county, of such who were present at the said record; and I have prefixed the same day to the parties within written, that then they might be there ready to proceed in the faid plaint, as should be just according to the exigency of the faid writ.

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E. F. Sheriff.

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The form of the schedule annexed to the return.

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At the ninth county court of O. P. Efg; late Sheriff of the county of Berks, held at Abingdon in and for the faid county, the 18th day of October, in the twentieth year of the reign of our favereign lord George the third, by the grace of God of Great Britain, and fo forth : And in the year of our Lord one thousand seven hundred and seventy nine, before G. H. I. K. L. M. and others, free fuitors of the faid court, came A. B. in his proper person, and complained against C. D. of a plea of trespals on the case, &c. And he found pledges for profecuting his faid plaint, to wit, John Doe and Richard Roe; and puts in his place John Dixon his attorney, against the said C. of the said plea, and it is granted to him. And thereupon it is commanded to Thomas Wall, bailiff and minister of the faid court, that he put by furety, and fafe pledges the faid C. fo that he may be at the next county court, before the faid fuitors of the faid court, at Abingdon aforesaid, to be held the fifteenth day of November, in the twentieth year aforefaid, to answer to the faid A. of his faid plea, the same day is given to the faid A. here, &c.

At the tenth county court of the faid late Sheriff O. P. Efg; held at Abingdon, in and for the faid county, the fifteenth day of November, in the twentieth year of the reign of our fovereign lord George the third, by the grace of God of Great Britain, France and Ireland, king, defender of the faith, &c. and in the year of our Lord one thousand seven hundred and feventy nine, before I. K. L. M. and others, free fuitors of the faid court, came the faid A. by his attorney aforesaid, and offered himself against the said C. of his plea aforefaid; and the faid Thomas Wall, bailiff and minister of the faid court, now certifies to the same court, and returns to the faid court, here the faid precept, to him in form aforesaid directed, and that he had put by furcties, and fafe pledges, to wit, John Denn and Richard Renn, the faid C. that he might be here at this day to answer the faid A. of the plea aforefaid, as it was commanded to him; upon which the faid C. being folemnly required, came here in his proper person to answer the said A. of the plea aforefaid; and puts in his flead Peter Blake, his attorney, against the said A. of the plea aforesaid; and thereupon the faid A. prays a day to declare against the faid C. in the faid plea here, until the next county court, to be held in and for the faid county, at Abingdon aforefaid, to wit, The thirteenth day of December, in the faid twentieth year of the reign aforesaid; and it is granted to him, &c. and the same day is given to the said C. here, &c.

And at the eleventh county court of the faid late Sheriff, held at Abingdon aforefaid, in and for the faid county, the thirteenth day of December, in the twentieth year of the reign of our fovereign lord George the third, by the grade, &c. and in the year of our Lord one thousand seven hundred and seventy nine, before W. S. T. R. and others, free thirds of the said court, came, as well the said A. as the said C. by their attornies aforesaid; and hereupon the said A. then declares in the said plea, in form following, that is to say, the county court of the said county of Berks, to wit, A. B. complains against C. D. of a plea of trespass upon the case, and there are pledges of prosecution, to wit, John Doe and Richard Roe. And whereas the same A. B. by John Dixon his attorney, complains, that whereas the said C. D. [here insert the whole declaration.]

And the faid C. by Peter Blake his attorney, defends the wrong and injury, when, &c. and prays leave to imparl thereupon here until the next county court, to be held in and for the faid county, at Abingdon aforefaid, to wit, On the tenth day of January, in the said twentieth year, and he hath it, &c. The same day is given to the said A. here, &c. And at the twelfth county court of the faid late Sheriff, held at Abingdon, in and for the faid county, the tenth day of January, in the twentieth of the reign of our fovereign lord George the third, by the grace of God, &c, and in the year of our Lord one thousand seven hundred and eighty, before W. S. T. P. S. R. and others, free fuitors of the faid court, came, as well the faid A. as the faid C. by their attornies aforefaid; and thereupon the faid C. as before, defends the wrong and injury, when, &c. and fays, &c. [here infert the plea, &c. and replication, if it was at the fame court, if not then a continuance till issue was joined.] And the said A. doth so likewise. Therefore it is commanded to Thomas Wall, bailiff and minister of the faid court, that he cause to come here at the next county court, to be held in and for the said county, at Abingdon aforesaid, to wit, On the 7th day February, in the twentieth year of the reign aforefaid, twelve good and lawful men of Abingdon aforesaid, and within the jurisdiction of the faid court, by whom the truth of the matter might be better known, and who are neither of kin to the said A. nor to the said C. to make a

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ie id certain jury of the country, between the parties of the faid plea, because, as well the said A. as the said C. between whom the contest is, have put themselves upon that jury; the same day is given by the said court here, as well to the faid A. as to the faid C. here, &c.

And at the thirteenth county court, of the faid late Sheriff. held at Abingdon aforefaid, in and for the county aforefaid, the feventh day of February, in the twentieth year of the reign of our fovereign lord George the third, by the grace of God, &c. and in the year of our Lord one thoufand seven hundred and eighty, before I. D. T. P. S.R. and others, free fuitors of the faid court, come as well the faid A. as the faid C. by their attornies aforefaid. the faid Thomas Wall, bailiff and minister of the faid court, returned his faid precept of venire facias to him in form aforefaid, directed in all respects, served and executed. And the faid jury, in form aforefaid, impanelled, being folemnly required, come, and twelve of them, to wit, G. H. I. K. &c. &c. who, to speak the truth of, and upon the premifes above-mentioned, being chosen, tried, and fworn, by the faid court, thereupon their oaths fay, that the faid C. [here infert the verdict] and affefs the damages of the faid A. by occasion of the faid premisses, besides his cofts and charges by him about his fuit in this respect laid out to 30 shillings, and for those costs and charges 6 pence. Therefore, it is confidered by the faid court here, that the faid A. fhould recover against the faid C. his faid damages, costs and charges, to 30 shillings and 6 pence, assessed by the faid jury, in form aforefaid; and also 54 shillings and 2 pence to the faid A. at his request, by the faid court here adjudged, for his increased costs and charges; which faid costs and charges amount in the whole to 41. 45. 8d. and the faid C. in mercy, &c.

And at the first county court of me E. F. Esquire, the prefent Sheriff of the county of Berks aforesaid, held at Abingdon in the fame county, the 7th day of March, in the year aforesaid, before I. K. T. R. W. S. and O. M. four lawful knights of the same county, I caused the said plaint, proceedings and judgment, between the parties aforefaid, to be recorded as the writ hereunto annexed requires; in testimony whereof, as well I the said Sheriff, as the faid I. K. T. R. W. S. and O. M. who were prefent at the faid record, have caused our seals to be hereunto put, the day and place last above-mentioned.

E. F. Efq; Sheriff.

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Upon the return of the writ, the plaintiff in error must

And hereupon the faid C. fays, that false judgment is given against him in the proceedings aforesaid, in many instances; that is to fay in this, that in the faid declaration, the faid record above specified, there is not any positive allegation that the faid A. doth complain against the faid C. for the faid supposed breach of promise in the said declaration fpecified, but the same is only alledged by way of recital; and also in this, that it doth not appear, &c. [and so on, reciting the errors as they appear on the record. ] And fo the faid C. fays, that in the faid court, of the faid county, falle judgment hath in divers instances being given against the faid C. in and upon the faid plaint; and he prays that the faid judgment, for the faid defects, and for others in the faid record appearing, may be reverfed, annulled, and utterly made void, as being false and erroneous; and that the faid C. may be restored to every thing which he has loft on occasion of the said judgment, and that the said justices here may proceed to the examination of the faid premilles.

The ferjeant's or counfel's name who figns it.

the faid C. in mercy, &c.

And the said A. B. says, that there is no error in the proceedings aforesaid, nor is any salse judgment given against the said C. D. upon the said plaint mentioned in the said record above specified; and he prays that the said justices here may proceed to the examination of the said record, and to the reformation and correction of the salse judgment, if any such may be formed, or appear to be given therein, &c.

costs and charges amount in the whole to a least 8 deand

And at the first county court of me E. F. Esquire, the prefert Sherist of the county of Berks aforesaid, held at Abingdon in the same county, the 7th day of March, in

the year aforefaid, before I. K. T. R. W. S. and O. M.

four lawful knights of the fame county, I caused the faid

plaint, proceedings and judgment, between the parties

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requires; in tellimony whereof, as well I the faid Sherlf,

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L. P. Elq: Sheriff.

fent at the faid record, have fauled our leals to be hereunto

10 put, the day and place half above-mentioned.

N. Habeas Corpus is a writ for bringing the body of him who is imprisoned, before the court, cum causa detentionis, and is the proper remedy wherever a person is restrained of his liberty by being confined in a common gaol; or by a private person, whether it be for a criminal or a civil cause, to have his body and cause removed to some superior jurisdiction, which hath authority to examine the legality of such commitment; and on the return thereof, either bail, discharge, or remand the prisoner. Vaugh. 136.

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Of this writ of babeas corpus there are various forts, viz. The babeas corpus ad subjiciendum, which issues in criminal

cafes.

Also, the babeas corpus ad deliberandum et recipiendum, another writ issuing in criminal cases to remove a person to the proper place, where he committed an offence, to be

Also, the babeas corpus ad respondendum, which issues where one has a cause of action against a person (already confined for a cause of action accruing within an inferior jurisdiction) to charge him with this new action in a fuperior court.

Also, the babeas corpus ad satisfaciendum, which issues after a

judgment.

But the writ of habeas corpus, of which it will be necesfary to treat here, is that of habeas corpus ad faciendum et recibiendum, which issues only in civil cases, and lies where a perfon is fued and in gaol, in some inferior jurisdiction, and is willing to have the cause determined in some superior court, which hath jurisdiction of the matter. This writ is usually called an babeas corpus cum causa, and is grantable at all times of common right, whether in term or vacation, without any motion in court; and upon the delivery thereof to the officer or court below, it instantly superfedes all the proceedings therein.

But an babeas corpus, where a party is committed for a crime, ought to be on motion. I Lev. 1.

ti judges of officers of fuch court, wherein or to whom

" fuch writs shall be delivered, (but they may proceed there-" in, as if no fuch writ were fued forth or delivered) ex-" cept, that the faid writ or writs be delivered to fuch judges " or officers of the faid court, before that the jury, which is " to try the cause in questions and the party that succ forth " the mid writ, or tor whole benefit it was fued forth, have " appeared, and one of the faid jury fworm to my the faid

10 And by the 21 Nacit to 2's A of it is enacled, it I hat so write of energy responses to the or other write fued

### Of the Habeas Corpus ad faciendum ET RECIPIENDUM.

THE court of Common Pleas as well as the King's Bench, has a general jurisdiction to grant writs of habeas corpus in all cases whatsoever; but if, upon the return of such writ to the court of Common Pleas, it appears that the body was in custody for any criminal matter, that court cannot take cognizance of it. See Wood's case. 3 Will.

The writ of habeas corpus is engrolled on a five shilling stamped piece of parchment, which is made out upon a note given to the office, and in B. R. is signed by the signer of the writs; in C. B. by the Prothonotary, who take fees to the

amount of fix or feven shillings.

In fuing out the writ, care must be taken to state the stile of the court, or person to whom it is to be delivered, with

accuracy.

The liberty which every defendant had, against whom an action was commenced in an inferior court, of removing it into a superior court at Westminster to be determined, was formerly very much abused; as it was usual for a defendant to fue out a writ of babeas corpus cum caufa, and keep the same in his pocket till issue was joined, the jury fworn, and the plaintiff below had actually given his evidence, and then to produce the writ, and suspend all further proceedings; by which piece of knavery, the defendant, from a knowledge of the evidence produced by the plaintiff, had an opportunity of making a better defence hereafter, when the cause came to be tried. But to prevent this abuse for the future, by the 43 of Eliz. c. 5. it is enacted, That no writ of babeas corpus, or other writ fued forth by " any person whatsoever, out of any of her majesty's courts " of record at Westminster, to remove any action, suit, " plaint, or cause depending in any inferior court, having i jurisdiction thereof, shall be received or allowed by the "judges or officers of fuch court wherein or to whom " fuch writs shall be delivered, (but they may proceed there-" in, as if no fuch writ were fued forth or delivered) ex-" cept, that the said writ or writs be delivered to such judges " or officers of the faid court, before that the jury, which is " to try the cause in question, and the party that sued forth " the faid writ, or for whose benefit it was sued forth, have " appeared, and one of the faid jury sworn to try the faid " cause."

And by the 21 Jac. 1. c. 23. f. 2. it is enacted, "That "no writs of habeas corpus, certiorari, or other writ sued "forth

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## Of the HABEAS CORPUS AD FACIENDUM

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forth to remove any action or fuit commenced in any inferior court, having jurisdiction thereof, shall be allowed by the steward, judges, or officers thereof, unless delivered before iffue or demurrer joined in the said cause so deserged before iffue or demurrer joined in the said cause so deserged before iffue or demurrer joined in the said cause so deserged by the said iffue or demurrer be not joined within six weeks next after the arrest or appearance of the

defendant to fuch action or fuit," nut a no vive of ensem

And by feet. 3. "If any such action or suit so as aforesaid, commenced in such inferior court be removed by any writ or process, and afterwards remanded back by writ of procedends or other writ, that then the said action or suit shall never afterwards be removed or stayed before judgment, by any writ out of any court whatsoever."

And by fett. 4. it is enacted, "That if in any action or fuit, not concerning any freehold or inheritance, or title of lands, leafe or rent, be commenced or depending in fuch inferior court of record, it shall appear or be laid in the declaration, that the debt, damages, or things demanded, do not exceed 51. then such action or suit shall not be stayed by any writ whatsoever, other than writ of error or attaint."

And by the feet. 6. it is provided, "That this act shall extend only to such inferior courts of record, and for so long
time only, as there is or shall be an utter barrister of three
years standing at the bar of the four inus of court, steward or
under-steward, town-clerk, judge, or recorder of such inferior court, or affistant to the judge or judges of the
same, as shall not be an utter barrister of that standing,
and there present, and not of counsel in any action or suit

" there depending." remot strong with with

After this statute was made, an expedient was hit upon by some knavish defendants to render the fourth clause thereof ineffectual; which was, by setting up a sictitious action against

On shewing cause against a procedendo to the borough court of Portsmouth, it was urged, that they had tried the cause without the presence of an utter barrister of three years standing. [The cause was tried before an attorney, who was deputy to the judge of the court, who was of more than three years standing.] It was held, that by the stat. 21 Jac. 1. such utter barrister ought in all events to be present at the trial. Procedendo denied; and rule to shew cause discharged. Fanley v. M' Connell. Burr. Rep. 4 pt. 515.

#### Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM.

themselves, (when the suit below was under 5%) for a pretended demand of 5 l. or upwards, and then bring an habeas corpus thereon, which writ removed all causes against them in that court; and thereby, notwithstanding this clause, the imaller action under 5 h was removed into the superior court. to the prejudice of many poor plaintiffs, who, for want of means to carry on a fuit in the superior court, were obliged often to defult from profecuting, and submit to the loss of their demands.

But by 12 Geo. 1. c. 29. f. 3. to prevent fuch practice in. future, it is enacted, "That the judges of fuch inferior "courts of record, as are described in the statute of Ja. 1. " may proceed in fuch actions commenced as are therein " specified, which appear or are laid not to exceed the sum " of five pounds, although there may be other actions against " fuch defendant, wherein the plaintiff's demands may ex-

" ceed the fum of 51."

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The statute of 12 Geo. 1. c. 29. empowers the plaintiff. upon an affidavit made and filed that his cause of action amounts to ten pounds or upwards, to arrest the defendant by process out of the superior courts.—And where the cause of action amounts to forty shillings or upwards, within the jurisdiction of inferior courts, to arrest the defendant by process out of such inferior courts. But this being found very inconvenient, and prejudicial to the lower class of people, by putting it in the power of any one to whom they were indebted in forty shillings, within the jurisdiction of the Marhalfea, or other inferior court, to arrest and imprison them. the stat. 19 Geo. 3. c. 70. extends the former part of the 12 Geo. 1. c. 29. to inferior courts; fo that neither in the Superior nor inferior courts, can any one now be arrefted, or held to special bail, unless by process founded on an affidavit duly made and filed in the court, that the cause of action amounts to ten pounds or upwards.—But to prevent inconveniencies and delay to plaintiffs profecuting for small debts in such inferior courts, by the same statute, 19 Geo. 3. c. 70. it is further enacted, ". That no cause, where the cause of action " shall not amount to the sum of 10 l. or upwards, shall be " removed or removeable into any superior court by any " writ of babeas corpus, or otherwise, unless the defendant, who shall be defirous of removing such cause, shall enter " into a recognizance, with two fureties, in double the fum " laid in the court from which it is to be removed for payment of " the debt and costs, in case judgment shall pass against him."

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, when grantable, and to what Places. mission execute he spine ago as where High R.

BY Reg. Mich. 1654. feet. 7. A writ of habeas corpus to remove the body of a priloner directed to the Sheriffs of London or Middlefer, the judges of the Marshalfea court, or inferior courts within five miles of London, may be granted in vacation or term time, returnable immediately; but if the as corpus be directed to any other Sheriff, or court farther distant, it must be returnable at a day certain in court, unes it be to deliver over a prisoner in discharge of his bail. Prax. U. B. 1.

But notwithstanding the above rule in both courts, it was held in B. R. in the case of Doctor Bettefworth v. Bell, Burr. 4 pt. 1875. That fuch writ of babeas corpus ad faciendum et recipiendum, directed to a gaoler, &c. of an out county, may be returnable before a judge, and immediate, as well as on a day certain in term. And it was there faid, that the above rule, Mich. 1654. was fallen long since into difuse.

The writ of babeas corpus being a prerogative writ, lies by the common law to any part of the king's dominions, for he ought to have an account why any of his subjects are imprisoned. 1 Rol. Abr. 69. Cro. fac. 543. It lies to ferfry and Guernsey. Vent. 347. Sid. 386. To Berwick and is counties palatine. Latch. 160. 3 Keb. 279. And to the marshes of Wales, as it does to all other courts which derive their authority from the king, as all the courts exercising jurisdiction within his dominions do; and that it being a prerogetive writ, does not come within the rule brevia demini regis non current, &c. for that must be understood of writs between party and party. 2 Rol. Abr. 69. Wetberley

But an babeas corpus ad faciendum et recipiendum does not lie to the cinque ports, at the fuit of a subject. Vide Bac.

Abr. and authorities there cited. 3 Vol. 4.

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# The Form of the Writ of HABBAS CORPUS

THE form of the writ of babeas corpus cum causa, &c.

GEORGE the third, &c. To the [describe the sheriff, judge, or fleward of the court to which it is directed properly] greeting. We command you, that you have the body of C. D. detained in our prison under your custody. as it is faid, by whatfoever name he may be called, in the fame, together with the day and the cause of the taking, and detaining the faid G. D. before our right trusty and well beloved William earl of Mansfield, our chief justice, assigned to hold pleas in our court before us, for if in G. B. before Sir William De Grey, knight, our chief justice of the Bench ] at his chambers, fituate in Serjeant's Inn, in Chancery-lane, or if to be returnable in term, make it returnable at a day certain in term] immediately after the receipt of this our writ, to do and receive all and fingular those things which our faid chief juffice shall then and there consider, of him in this behalf, and have there this writ. Witness,

If the writ be returnable before the chief justice, any other judge of the court may commit the defendant to the

prilon of the court.

Befides the fees paid upon suing out the writ, and sealing the same, sees are paid in the inserior court to the Sheriss, or Judge thereof, for the allowance of the writ, for the return thereof, for the number of causes there happen to be against the desendant in such inserior court, &c. Also sees paid upon the warrant to the bailiss to bring him up, and to the gaoler to deliver him, besides the sees paid at the judge's chambers of it is returnable in court, to the secondary, crier, tip-stall, &c. to the amount sometimes of three or sour pounds.

they and authorisies there eited, : 2 Pol. 4.

Vor. II.

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OF

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of returning the Writ, &c.

THE writ of babeas carpus, immediately upon being ferved, suspends the power of the inferior court; and if they proceed afterwards, the proceedings are void, and coram non judice. I Salk. 352. Cro. Car. 261. 2 Jones 200.

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A habeas corpus to the town court of Nottingham, was delivered to the proper officer in open court, to remove a plaint from that court before trial, yet the court below went on to the trial; and defendant moved for an attachment against the Sheriff, for proceeding to trial after babeas corpus delivered, and rule made to shew cause. On shewing cause it appeared, that the issue was joined 27th of April, and the habeas corpus was not delivered till May, fo the court, below was warranted to proceed [vide 21 Jac. 1. ante.] And the rule was difcharged. Barnes, 221.

The record itself is not removed by babeas corpus as it is by certiorari, but remains below; and the return is only a

history of the proceedings.

The writ must be returned by the same person to whom it is directed; and where the writ was awarded to a Sheriff, who before the return left his office, and a new Sheriff was made who returned languidus, the court held the return not good; but it ought to be returned by the two Sheriffs; by the old Sheriff that he had the body, and had delivered it to the new Sheriff; and then the new Sheriff might have returned languidus. Peck v. Creffett. Paf. 26 Car. 2. ad base

The writ must be returned, otherwise an alias and pluries

goes; and after that, an attachment.

A defendant being in custody of the Sheriff of Bristol, brought his babeas corpus to be removed to the Fleet, and tendered it to the Sheriffs, with seven guineas, (exceeding Is. per mile) which the Sheriffs refused to accept, infifting on 101. On which the defendant moved for an attachment against the Sheriffs; which, on shewing cause was made abfolute. Barnes, 377.

It was held, that a Sheriff upon an habeas corpus is not bound to bring up the prisoner, unless reasonable charges be tendered him. Cox v. Dowl. Hil. 20 & 21 Car. 2.

But in Hopman v. Barber, Stra. 814. It was held fince, that an officer must obey the writ of babeas corpus, though the party refuses to pay him his fees, for he has a remedy for Of BUE! th

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Of the Habeas Corpus and FACIENDUM ET RECIPIENDUM, and herein of returning the Writ, &c.

But then the court will not, upon his being brought up, order him to be turned over to the prison of the court, till the officer is satisfied his charges for bringing him up. Vide

Stra. 308.

An habeas corpus cum causa went to the Portreeve of Yeavil in Somersetsbire, who returned, that before the coming of the writ the party was bailed; and the plaintiff's counsel moved for a better return; and it was ruled, that he should make a better return; for though the body be bailed, he ought to return the cause—and the body cannot be bailed after the writ

received. Salmon v. Slade, Hil. 25, 26 Car. 2.

An habeas corpus went to the stannary court, to which an insufficient return was made, and therefore disallowed. Et per cur. The warden of the stannaries must be amerced, and you may go to the coroners and get it affected, and estreat it; and an alias habeas corpus must go for the insufficiency of the return to the first, and upon that the body and cause must be removed up; if another excuse be returned, we will grant an attachment. Salk. 350. pl. 8.

Where an habeas corpus is directed to an inferior court, and the steward has liberty to proceed by the 21 fac. 1.c. 23. yet the writ must be returned with the special matter, or the person to whom it is directed will be in contempt.

Carth. 69.

Where an habeas corpus is properly sued out, so as to sufpend the proceedings, it is sufficient for the party to whom it is directed, to return generally the cause for which the party is in custody with the body; but where the babeas corpus is irregular, or the court proceeds afterwards, they must return

the whole special matter.

On an babeas corpus to the Mayor, &c. of Hertford, to remove a cause out of the court of that borough. They returned, and set out their charter, empowering them to hold a court, &c. as far as was necessary. Then the action against defendant, [which was on simple contract to plaintist's damage of 91.] the judgment by default, writ of enquiry, final judgment, the award of a ca. sa. the return and commitment of defendant in execution to their gaoler. And they moreover returned, that the writ of babeas corpus did not arrive till after interlocutory judgment; that defendant on the arrival of the writ was not in custody; and that he did not on the arrival.

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Of the HABEAS CORPUS AD FACIENDUM BET RECIPIENDUM, and herein of returning the Writ, &c.

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rival of the writ, or afterwards, enter into or offer bail to the court for payment of the debt and cofts, according to the flatute 19 Geo. 3 c. 70. f. 5 & 6. [the cause of action not amounting to 101. and he being defirous of removing it. fendant was brought in Eafter term before Mr. Juffice Her at chambers; but the judge observing the return thus and that this was a new cafe on the flat. 19 Geo. 3. ordered defendant to be brought up in court. When defendant was brought up, and the return read, the plaintiff below moved to have him remanded. Et per tot cur. He must be remanded. Defendant's counsel objected to the return as too special and long. Sed per cur. The return is proper, and would not have been good otherwife. The court proceeded after the arrival of the writ; and for want of bail, according to the flatute, the writ did not suspend the proceedings: they were forced, therefore, to make a special return: Plaintiff then moved for the costs of bringing him up, grounding his motion on defendant's irregularity. Et per cur. Be it fo; let the costs be taxed, and the amount thereof inferted in the rule to remand him; whereby the gualer East: 22 Geo. 3. An babeas corpus was fued to remove a cause out of Lan-

An babea corpus was fued to remove a cause out of Landon; the plaintist prayed a procedendo, because the action was for calling the plaintist whore, which is not actionable elsewhere.—The desendant's counsel alledged, that neither of the parties lived in London, nor were the words spoken there. And per Hale, ch. just. If the words were not spoken there, the plaintist shall not have a procedendo, for the words may be made actionable every where, by laying them in London.

2 Roll. Abr. 60.

In a like action in London, before declaration, an habias corpus was brought to remove it into B. R. to which the Sheriffs returned generally, that at fuch a court came the plaintiff, and levied his certain plaint against the defendant in a plea of trespass on the case, to the damage of 5001 subercupon issue was joined, which remains still undetermined, &c. And upon the return a procedende was prayed, upon a suggestion, that the action was commenced for calling plaintiff where, which is actionable in London, and not elsewhere; therefore if a procedende should be denied, plaintiff would lose her action, and

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and by this means all fuch actions would be loft; and an affidavit was produced, in which plaintiff deposed, that the only cause of action was ut supra. Per Halt. It does not appear by this return, what was the cause of action, The declaration itself ought to be returned upon the babeas respus, and then the court would see what the cause of action was. And if the writ was delivered before the plaintiff had declared, yet he ought immediately to have entered his declaration, that it might be returned upon the writ. For all the proceedings in this case of a custom ought to be returned, as well as in an action upon a bye-law. Afterwards the return was amended, and then the court granted a procedendo.

Watfon v. Clerke. Carth. 75.

On an babeas corpus to the Sheriffs of London, they returned an action on a bye-law, with a penalty; and then it was moved to have the return filed. Pen Holt. 1. If a record is once filed here, it can never after be remanded, either in the term it is filed, or any other .- 2d. The record itself is never removed by bab. corp. the return is only an account of the proceedings; and when it is removed the plaintiff must declare de novo against the defendant in custodia mareschalli, &c. 3d. The hab. corp. immediately suspends the power of the court below. 4th. The return in this case may be filed, because the very record is not returned, and therefore will not be filed; of confequence then a procedendo may be granted, because it will not fend out any record filed, but only remove the suspension. Accordingly, the writ being filed, a procedendo was awarded. b Salk . 352 of physbandry a some fon thatle

An action against a feme covert, as sole trader, may not be removed by babeas corpus from the city courts. Pope v. Vaux and wife. Eaft. 16 Geo. 3. C. P. 2 Blacks.

Rep. 1060.

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If a writ of habeas corpus is made returnable immediate, it ought to be returned the same day it is delivered, and the

body brought up immediately.

By the old rule, Mich. 1654, all writs of habeas corpus directed to any Sheriff or officer of an inferior court, at above the distance of five miles from London, if made re-turnable in Hilary or Trinity terms, must be made returnable at a day certain preceding the fecond return of those E e. 3

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terms, in order, if bail be required thereon, the plaintiff may be enabled to declare of the fame term, and the defendant shall be obliged to plead to iffue as of these terms, so that the plaintiff may try his cause the next affizes, if he thinks sit; or in default of pleading, that judgment may be entered against defendant of the same term, if rules to plead are given in due time.

And if the habeas corpus is fued out in Hilary or Trinity terms, or the beginning of the vacations of those terms, the writ must be made returnable the first or second return of the subsequent terms, viz. Easter or Michaelmas, or the plaintiff, on summons before a judge, may have a pro-

cedendo.

After interlocutory, and before final judgment in an inferior court, an habeas corpus cum causa was brought; before the return of the writ the defendant died, and a procedendo was awarded; because, by the 8 & q W. 3. c. 11. the plaintiff may have a scire facias against the executors, and proceed to judgment, which he cannot have in another court; and by this means he would be deprived of the effect of his judgment, which would be unreasonable. Salk. 352.

A cause was removed, after interlocutory, and before final judgment, by babeas corpus, and a procedendo was refused, because this is not within the words of the act 21 fac. 1. c. 23. which are, that the babeas corpus, certiorari, &c. shall not be received or allowed, but that the inferior judge may proceed; except the writ be delivered to fuch inferior judge, &c. before issue or demurrer joined in the cause, (so as it be not joined within fix weeks after the arrest or appearance of the defendant.) And the practice having been to allow the babeas corpus, if delivered before the jury are sworn, the court refused a procedendo. Burr. Rep. 4 pt. 758, but see Pract. Reg. C. P. 217. cont.

Motion for a procedendo to a borough court, the babeas corpus to remove the cause having been brought after interlocutory judgment: and the court of C. P. held the habeas corpus too late, and made the rule for a procedendo absolute.

Barnes, 221.

The Lord Mayor, Aldermen, and Sheriffs, of London, moved to amend their return of defendant's writ of hab. sorp. cum caufa. The substance of the return was the action Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of returning the Writ, &c.

between the said parties in debt for the penalty of a bye-law brought against defendant for employing a foreigner, (no freeman of the city) and the custom to make bye-laws; but the custom to employ freemen, and not foreigners within the city was omitted; which last mentioned custom it was prayed might be inserted in the return. For defendant, it was submitted, whether the return was amendable or not, especially as another rule touching the granting of a procedendo was pending. But the rule to amend the return was made absolute. Harrison, Chamberlain of London, v. Potter. Barnes, 23.

the physical, on funmous before a judge, may have a pra-

After interlocutory, and before huab sudgment in an instantic court, an babias corps sum casta was prought to be fore the return of the writtine defondant died, and a procedle the sawarded; because, by the 8 S of th, z. c. 11. the plaintiff may have a third facial against the executors, and proceed to judgment, which he cannot have an another court, and by this means he would be deprived of the effect of his judgment, which would be unresionable. Suke, 252

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A came was removed, after membrane, and before had judgment, by hebear cirpus, and a preseduale was retuted, because this is not within the words of the act 21 Jac. 1 c: 23, which are, that the hebeas corpus, certificary, &c. thalf not be received or allowed, but that the interior, judge may proceed; except the writ be delivered to fuch interior judge; & heiore iffur or demarrer joined in the cause, (so as, it he not joined within his weeks after the arrest or appearance of the desendant.) And the practice having been to allow the habeas corpus, it delivered before the jury are sworn, the court retured a proceasance. Burr. Rep. 4 pr. 758. but see Pract. Rep. C. P. 217. com.

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The Lord Mayor, Aldermen, and Sheriffs, of London, moved to amend their return of defendant's writ of bates for came cause. The substance of the return was the action between

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IN all cases where special bail is required in the court below, if the cause is removed by baheas corpus either into B. R. or G. B. special bail must be put in above on the removal, though the debt is under 101. except the defendant is an heir, executor, or administrator. Reg. Hit. 2 Jac. 2.

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The above is the old rule—but now, by the 19 Geo. 3. 3. 30, as no one can be arrested or held to special bail in any inserior court, without an affidavit made and filed that the canse of action amounts to 10% or upwards; it follows, that where the debt is under 10% and the defendant is not arrested below, there he would not be obliged upon removal to find special bail above. But to deseat the advantage that might be taken of this, by removing the cause in order to delay the plaintiss, the same statute provides, that no action in an inferior court, not amounting to 10% or upwards, shall be removed by habeas corpus, &c. unless the defendant shall be removed by habeas corpus, &c. unless the defendant shall enter into a recognizance, with two sureties, in the court below, in double the sum for which the action is brought, for payment of the debt and costs in case judgment shall pass against him.

An heir, executor, or administrator, although he has put in bail below, shall not, upon removal, put in bail above to pay the condemnation money; yet he shall put in bail above to appear to a new bill or original, within two terms, but not after. But if debt is brought against an executor, on a judgment suggesting a devastavit, he shall give bail, for there the action is in the debet et detinet. Vide Salk. 98.

and 1 Lev. 268. 2 Lev. 204. 3 and ment ni bing 21 month

No bail to be tendered, or put in upon an babeas corpus, until the babeas corpus, and the cause for which bail is to be put in, be returned, to the end that it may appear for what cause the desendant is detained, and bail may be taken, and the babeas corpus and bail duly filed. Mich. 1654. Pas.

29 Car. 2. Hil. 16 W. 3.d bas ni tuq nedwenie the had

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A defendant who has removed a cause from an inserior court into B. R. or C. B. is not of course obliged to put in special bail there; but it lies with the plaintiff to compel him so to do. In order therefore to get bail to the action, the plaintiff, immediately as he discovers that the cause is removed, should take out a rule, or order, from the chambers of one of the judges of the court, for a procedendo to remand the

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the cause, unless good bail be put in within four days next after notice of the rule (if in term) or within fix days next after notice of the rule, [if in vacation] and then serve a copy of such rule or order on the desendant, or his attorney; and unless bail be put in accordingly, a procedendo may be had.

An action was brought in the sheriff of London's court against two partners, one brought an babeas corpus, and put in ball for himself only. And a procedendo being moved for, it was granted: for otherwise, the plaintiff would be disabled to go on in either court. Fry v. Carey. Stra. 527.

Habeas corpus to remove a cause out of an inferior court, and on search plaintist's attorney found bail; but the habeas corpus not being returned and filed, the bail fignified nothing, and therefore he carried the cause back by procedendo, of which defendant complained to the court; but it was ruled, that the defendant cannot put in bail till the habeas corpus be returned. Masters v. Bruges. Mich. 20 Car. 2.

If common bail only is necessary, the attorney for the defendant fills up a common bail-piece to the babeas corpus and return, and files the same at the judge's chambers on the return of the rule, and gives notice of having filed the same to the plaintiff's attorney.

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If special bail is required, the defendant upon service of the rule for bail engrosses a bail-piece, and annexes the same to the babeas corpus and return; and then takes the bail to the judge's clerk, who will take their acknowledgment, to whom is paid in term 6s. 6d. in vacation 7s. 6d. and then notice thereof must be given to the plaintiff's attorney.

In B. R. if bail be taken in the absence of the plaintiff, of his attorney, the same is taken de bene esse; and if on due notice in writing of the names and places of abode of such bail, the time when put in, and before whom, no exception thereto be taken by the plaintiff in twenty-eight days after the putting them in, the bail-piece shall then be filed within four days next after the end of the twenty-eight days. Mich. 16 Car. 21

In G. B. if bail be taken de bene esse, and on notice being given of the names and places of abode of the bail, the time when put in, and before whom, no exception thereto be taken

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days next after the expiration of the twenty days. Hil. 13 & Lar. 2.

And unless the bail, in case of no exception within time, be not filed within the four days, a procedendo may be granted upon a certificate that the bail is not filed. Same rules.

fendant's attorney with another rule or order for a procedendo, unless better bail be put in within four days after service thereof, whether it be in term or vacation. In term this rule costs 1 s. in vacation 2 s.

If this rule is ferved in vacation time, in B. R. the practice is, for the defendant's attorney to give notice only within the rule, that the bail will justify on the first day of the ensuing term.

But on service of such rule in vacation time in C. B. it is usual to justify within the sour days before a judge at his chambers, for which 25. is paid; and on the first day of the term justify in court.

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The practice is exactly the same as to notices of bail, exception thereto, and justifying bail on babeas corpus, as in other cases, for which refer to the first vol.

When bail is taken of a prisoner in custody, the judge's clerk in C. B. is to deliver the bail to the prothonotary to be filed, if assented to; and for that purpose, the prothonotary's fees are to be deposited; but the prisoner is not to be discharged until the bail be assented to, or the plaintist over-ruled in open court to accept the same upon examination.

Micb. 1654. Hil. 13 & 14 Car. 2.

If the defendant is an actual prisoner in an inferior court, and brings an babeas corpus to remove the action into a superior court, the babeas corpus will not discharge him out of custody till bail is put in above and persected; therefore it is the better way, to gain the defendant his liberty, to put in bail below, and then remove the cause into the superior court, if he would have it there determined.

fea, or other inferior court [London excepted] and the bail below offer to be bail above, the plaintiff cannot except to them, but is compellable to take them, because he might but did not except to them below. But it is otherwise in a cause

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a cause from London, for the sufficiency of the bail there is at the peril of the clerk, and he is responsible to the plaintiff; so that the plaintiff has not the liberty of excepting against them, and the clerk is not responsible if they be deficient in the court above, though he was in London. Salk. 97.

A cause was removed by habeas corpus, in vacation time, and the bail put in on the removal ought to have justified on the first day of the ensuing term: [a rule having been served on the defendant for a procedendo, unless better bail] and the bail not having offered themselves the first day of the term, a procedendo was sued out to remand the cause. On the second day of the term the bail came and offered to justify, but were then too late; however, a rule was obtained to shew cause, why the procedendo should not be set aside: But on shewing cause the rule was discharged, for it was said, that should this rule be made absolute, it would operate as a second habeas corpus, which can never be granted after a cause is once remanded by a procedendo. Anon. B. R. 1778. The counsel offered to pay costs of the procedendo, but nevertheless the court discharged the rule.

May 20th; 1742, an habeas corpus, returnable immediate, was lodged at the palace-court to remove a plaint into G. B. and nothing further was done in it till 20th of Nov. when the plaintiff ferved the defendant with a rule to put in bail. Defendant infifted, that the plaintiff should have served such rule within two terms after the hab. corp. brought, and was now too late. But the court held, that if the defendant had put in bail upon the hab. corp. without staying to be forwarded by a rule for bail; and the plaintiff had not declared within two terms after bail put in, the cause would then have been out of court; but the rule for bail is not limited to any particular time: accordingly, the rule to shew cause why proceedings should not be stayed, was discharged. Barnes, 90.

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If one be removed into B. R. by habeas corpus, and puts in bail, the bail are liable to all other actions, as well as that for which they become bail, at the fuit of the same plaintiff mentioned in the return of the habeas corpus, wherein he shall declare against the said defendant within two terms next after: but see the next case.

## 428 Or the Carit of Bavean Coppus.

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The defendant was arrefted by process out of an inserior court, in a plea of trespass on the case; bail was given, the plaintiff declared, and the cause was removed by habeas corpus; and then the plaintiff delivered two declarations, one for words, the other upon an assumptit. Per Hale. If a plaintiff has declared before the babeas corpus delivered, the bail shall be special only as to that action, and shall be common to the other: but if no declaration before habeas corpus, then the bail put in upon the babeas corpus shall be special bail to all actions of the plaintiff against the defendant of that term; and the plaintiff cannot declare before the babeas corpus allowed. Serle v. Newton, Hil. 25, 26 Car. 2.

When a defendant has removed his caule and the superior court, and perfedted his bail, he cannot fight a contrast for swart of a declaration, as the plaintiff is not in court till he has declared, and the caule is supposed to be removed against

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### Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of Declaring.

THE record itself is never removed by babeas corpus but remains below, therefore the plaintiff must declare de novo; and the declaration is exactly the same as in other cases: and if in B. R. he is stated to be in custodia mareschalli-

Salk. 352.

The plaintiff must declare before the end of the second term after the return of the babeas corpus, otherwise the defendant is not bound to accept a declaration. And notes If the babeas corpus is returnable in term, that term is one; and the plaintiff must declare before the end of the succeeding term. Vide Hutton v. Stroubridge. Stra. 631.

There is no limited time for the plaintiff's getting an order for a procedendo, unless bail be put in. Barnes, 90. But if the defendant puts in bail in time, and the plaintiff does not declare in two terms, the cause is out of court.

If a cause is removed by habeaucorpus out of the courts of Canterbury, Southampton, Hull, Litchfield, Pool, or other counties where the judges of nist prins seldom go, if the action be transitory, it must be laid in the county of Kent, Hampsbire, Yorksbire, Staffordsbire, or Dorsetsbire, or other county in which fuch city or town lies, and the recognizance is to be taken accordingly. Mich. 1654.

When a defendant has removed his cause into the superior court, and perfected his bail, he cannot fign a nonpros, for want of a declaration, as the plaintiff is not in court till he has declared, and the cause is supposed to be removed against

his inclination.

## 430 Of the Writ of habens Coppus.

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If a cause be removed out of London or Middlesex, the Marsbalsea, or any other court within five miles of London, in Hilary or Trinity term, and bail is put in, and the plaintiff declares in London or Middlesex, and delivers his declaration six days before the end of the term, the defendant shall plead three days before the essoign day of the subsequent term, that the plaintiff may enter the issue if he will; but if the plaintiff does not deliver his declaration far days before the end of the term, the desendant shall have an imparlance till the next term. Vide 1 Mod. 1.

And if a cause is removed out of any court, except in London or Middlesex, the Marshalsea, or other court within five miles of London, and the plaintist does not declare in London or Middlesex, but in some other county, and delivers his declaration at any time before the end of the terms of Hilary or Trinity, the desendant is bound to plead by the time the rule is out, that the plaintist may try his cause at the affizes, if he thinks proper; and for want of a plea in due time, judgment may be entered against him.

And if a cause is removed by habeas corpus returnable in Michaelmas term, and the plaintiff declares in London or Middlesex, and delivers his declaration before crastinum animarum, the desendant must plead to trial the same term.

So, upon an habeas corpus returnable in Easter term, if the plaintiff declares in London or Middlesex, and delivers his declaration before mensem Paschæ, the desendant must plead to trial the same term. Salk. 515.

But if the declaration is delivered after these respective times, and yet six days before the end of either of these terms, the defendant, wherever the action is laid, shall plead three days before the essoign day of the subsequent term; and if not delivered six days before the end of either of these terms, the desendant has an imparlance until the next term.

The above was the practice before the 5 & 6 Geo. 2. but by rule made in B. R. Tr. 5 & 6 Geo. 2. and Mich. 3 Geo. 2. in C. B.

On all process returnable the first or second return [i. e. before the \* third return] of term, if the plaintiff declares

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And by Reg. Tr. 7 Geo. 3. On all process returnable the

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in London or Middlefex, and the defendant lives within twenty miles of London, the declaration may be delivered with notice to plead within four days after delivery, and the defendant shall plead within that time; and if the plaintiff declares in any other county, or the defendant lives above twenty miles from Landon, the declaration is to be delivered, with notice to plead in eight days after; and if the defendant does not plead in that time, a rule to plead having been given and expired, and a demand in writing of a plea having been made, the plaintiff may sign judgment.

But a declaration must be delivered four days before the end of term, exclusive of the day of delivery, to have a plea

Since the making of the above rules, some have proceeded upon an babeas corpus according thereto, as if upon a cepi corpus; whilst others have adhered to the old practice.

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A plea in abatement must be pleaded within the four days, as in other cases of pleas in abatement. Vide Pleas in Abatement in the 1st vol.

Debt against a feme sole in the palace court, and after appearance and plea pleaded she married, and then removed the cause by babeas corpus; and after the plaintist had declared against her above, she pleaded her coverture in abatement, viz. that she was married at the time the habeas corpus sued out. And it was ruled a good plea, for the proceedings are de novo, and the court takes no notice of the proceedings below. But the court said, that if this matter had been moved on the return of the habeas corpus, they would have granted a procedendo: for though an habeas corpus be a writ of right, yet where it is to abate a rightful suit, the court may refuse it. I Salk. 8.

But note: That coverture, after an action brought, cannot abate a plaintiff's writ. Ld. Raym. 1525. Stra.

Though coverture before does, if the action is brought against her as a seme sole, and an habeas corpus to remove a cause, is considered as the first commencement of the action in the court above.

Defendant, whilft a feme fole, was arrested in the palace court; and a day or two after the arrest married, and then removed the plaint by hab. corp. into C. B. and pleaded her coverture in abatement. Whereupon plaintiff obtained a rule

## 432 De the Meit of Pabens Corpus.

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to fhew cause why the plea should not be set aside, which on hearing counsel was made absolute. Barnes, 355.

An action was brought in the Sheriff's court of London, and was removed by bab. corp. into B. R. the 6th of Nov. the first day of Michaelmas term. On the twelfth, plaintiff delivered his declaration, and gave a rule to plead: On which, the defendant moved for an imparlance, and infisted the practice was the same as if the action was originally commenced in this court, and cited Salk. 515. where it was held, that on bab. corp. returnable in Michaelmas term, if the declaration be delivered before crass. animarum, the defendant must plead to try; but on a cepi corpus, he is only to plead to enter.

So in Easter term, if the declaration be delivered before mensem Paschæ, the defendant, on an habeas corpus, must plead to try, upon a cepi corpus only to enter. But the court in the principal case said, We will not put the plaintiff in a worse condition than he was in the court below, and therefore resused an imparlance. 1 Will. 154.

All subsequent proceedings to the declaration, are the same upon an habeas corpus as in other cases.

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Of the Habeas Corpus and Faciendum et RECIPIENDUM, and herein of granting a Procedendo.

I Thas been shewn before, in what cases the plaintist is at liberty to remand the cause, upon the desendant's not complying, upon removing a suit commenced against him by habens corpus, with the statutes and rules of court made to regulate the proceedings therein upon such removal—as for not putting in bail, where special bail is required; not justifying bail in due time, when served with a rule; not pleading in time to the declaration delivered, Sc.

A Procedendo is a writ grantable by any judge of the court into which the cause was removed, upon application to one of their clerks at chambers. Which when engrossed on a two shilling stamped piece of parchiment, must be signed and sealed.—The writ is to this effect.

GEORGE the third, by the grace of God, &c. To the Sheriff of -- or judges of, &c. [stiling the court and judges thereof properly] greeting. Although we lately by our writ commanded you, that you should have the body of C. D. detained in our prison under your custody, as it was faid, under safe and secure conduct. together with the day and cause of his being taken and detained, by whatfoever name the faid C. might be called, in the same, before our right trusty and well beloved William earl of Mansfield, our chief justice, assigned to hold pleas in our court before us, at his chambers, fituate in Serjeant's Inn, Chancery-Lane, immediately after the receipt of that writ, to do and receive all and fingular those things which our faid chief justice should then and there consider of him in that behalf; yet we, being now moved with certain causes in our court before us, command you and every of you, that in all plaints or fuits against the said C. at the fuit of A. B. in our court before you, or any of you levied or affirmed, or before you or any of you now depending undetermined, you proceed with what speed you can in fuch manner, according to the law and custom of England, as you shall see proper. Our faid writ to you thereupon first directed to the contrary in anything notwithstanding.

Witness, &c.

[Storment and Way.]

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### 434 Of the Mirit of habeas Coppus.

Of the HABEAS CORPUS AD FACIENDUM ET RECIPIENDUM, and herein of granting a PROCEDENDO.

Upon carrying the writ of Procedendo to the secondary of the court to which it is directed, and filing it, the court instantly reassumes the jurisdiction of the cause, which can never afterwards be taken from them again before judgment. And as the writ of habeas corpus removes all causes that were in the court against the desendant, so the writ of Procedendo remands all back again.

enting our the matter of the combined it at length enjouse the court to can the parties below taking, and then the court to can the parties below taking, and having head the allegations and proofs, to exact juffice to be done because them:

It also has to releve ball in tome cases, and is writt of a most remedial nature, and other to have been invented left in the case there have been invented of in the case there have been invented of in the case there has a court or the case there are contract or the case there are passent or the case there are not or the orderer.

beins of law had no opportunity to make it. . Dus the du-

simple contents of the wint of and midden and delete and driven it quite out to practice. It sowers, as it one are a law rules in which this the tempty there: Mught account of the proceedings them account to the proceedings them.

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A N audita querela is a writ to give relief against a judgment or execution awarded, or likely to be awarded against the party, by setting the same aside upon some ground of injustice pointed out to the court.

If there is any other remedy at law, either by plea or otherwise, an audita querela does not lay, except in one or two instances, in which the party has his election of this or

another remedy.

An audita querela is an action, and is in the nature of a bill in equity to be relieved against the oppression of the plaintiss. The writ states, that the complaint of the defendant hath been heard audita querela defendentis, and then setting out the matter of the complaint, it at length enjoins the court to call the parties before them; and having heard the allegations and proofs, to cause justice to be done between them.

It also lies to relieve bail in some cases, and is a writ of a most remedial nature; and seems to have been invented, lest in any case there should be an oppressive desect of justice, where a party has a good desence, but by the ordinary forms of law had no opportunity to make it. But the indulgence now shewn by the courts in granting a summary relief upon \* motion, in cases of evident oppression, has almost rendered the writ of audita querela useles, and driven it quite out of practice. However, as there are a few cases in which this must still be the remedy, some short account of the proceedings therein cannot be altogether unnecessary.

Note: Where a party has a matter which he might have pleaded to a fcire facias in his discharge, and two nihils are returned and judgment against him, the court will relieve him upon motion, without putting him to an audita querela:

but aliter in case a scire seci be returned. Salk. 93.

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<sup>\*</sup> For it has been held, that relief may be granted on motion in cases proper for audita querela, where it is not grounded on soreign matter, as a release, &c. Ld. Raym. 439. Barnes, 277.

### Out of what Court the Writ issues,

N audita querela shall be granted out of the court, A where the record upon which it is founded remains,

or returnable in the same court. F. N. B. 105. b.

And therefore, if a man recovers in B. R. or C. B. the defendant having a release after judgment and before execution, shall sue the audita querela out of B. R. or C. B. where the record is. Ibid.

And if a recognizance is acknowledged, and there is a release of it, and then execution be sued on it, the party to be relieved shall sue his audita querela out of the same court. Ibid.

And fuch audita querela out of the rolls of the same court

is judicial. Ibid.

But it may be original, and the party may fue it out of Chancery returnable in the court where the record remains. Ibid.

But it cannot be granted out of any court, returnable in the fame court, where the record upon which it is founded

is not there. Ibid.

The writ of audita querela shall be allowed only in open court. I Bulf. 140. 2 Bulf. 97. 2 Show. 240. And on motion, by Trin. 9 Fac. 1. And therefore, when the curfitor has written the writ, an allocatur shall be indorfed by the fecondary in court.

So if it be irregularly granted, a vacat' shall be entered

upon the record. Mo. 354.

If in a sci. fa. on a judgment, defendant has a release and omits to plead it, he shall not have an audita querela. Vide

1 Will. 08.

Note: In an audita querela by two, the death of one shall not abate the writ, for the furvivor is not to be restored to any thing he has loft, but to discharge himself of the execution; and thereupon, notwithstanding the death of the other, he may proceed for a discharge in toto for himself. Vent. 34. 9 Mod. 249.

An audita quardle is no fuperhillar of itlells, and therefore execution may be taken out, unless a fuperhim be oftually

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## Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

I was faid before, that an audita querela lies to relieve the defendant after judgment and execution against him—and also that it lies to relieve bail when judgment is had against them upon a scire facias to answer the debt of their principal; but as the proceedings in the two cases somewhat differ, I shall first treat of the audita querela by the defendant himself.

In all cases it is usual, that the plaintiff in an audita querela be bailed, if he shews matter in writing for his discharge, and the desendant be demanded whether he can gainsay it. 1 Rol. 133. 384. 2 Rol. 113. 1. 5.

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If the plaintiff in audita querela has a release or other writing upon which his audita querela is founded, the same must be proved in court by the witnesses thereto, before the writ of audita querela can be allowed, or a supersedes granted. I Sid. 351. Salk. 92.

And then, after proof of such release, &c. and allowance of the writ, if he be not in execution he may be bailed by the court, and on motion may have a supersedeas. Com. Dig. 1 vol. 489. Salk. 92.

But if the plaintiff in audita querela be in execution, he cannot be bailed till the defendant plead to the audita querela. Comp. Att. 214.

But where an infant was taken in execution, and brought an audita querela, he was discharged on clearly proving his infancy. Carth. 278.

If an audita querela be founded on record, or the party be in custody, the process upon the audita querela, when allowed, is a scire facias.—But if the audita querela is grounded on a matter of fact, or the party be not in custody, but only brought quia timet, the process on the audita querela when allowed, &c. is a venire facias; and on default thereto, a distringas ad infinitum. Salk. 92.

If brought by one in execution, the scire facias is the process. Garth. 202.

An audita querela is no supersedeas of itself, and therefore execution may be taken out, unless a supesedeas be actually sued upon the allowance of the writ of audita querela. Salk. 92.

If the first writ of audita querela abate, upon a second purchased, he may have another supersedeas. F. N. B. 104. R.

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### Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

If one in execution is admitted to bail upon bringing an audita querela, he must procure four persons to be bail for him. The bail-piece is in the following form:

> Easter term, in the twentieth year of king George the third.

To wit, C. D. of, &c. is delivered on bail to prosecute, with effect, a writ of audita querela brought by him to be discharged of and from a judgment given against him in the court of our lord the king, before the king bimself, at the suit of one A. B. for five hundred pounds of debt, and for damages, cofts, and charges, to

E. F. of, &c. -G. H. of, &c. -

N. O. attorney.

I. K. of, &c. and

L. M. of, &c. -

The condition of the recognizance.

YOU feverally acknowledge yourselves to owe A. B. the

fum of one thousand pounds-

Upon condition that the faid C. D. shall profecute his suit with effect, and if he shall be convicted or make default in the premisses, that he shall pay the condemnation money, or you shall do it for him.

Are you content?

An audita querela lies not after judgment upon a matter which might have been pleaded before, but where the party was condemned, and had no day in court to plead it, an

As if a release be given after the day of nisi prius, and before the day in bank, the defendant cannot plead it, because there is a verdict already in the cause, and upon an another plea; and therefore the cause is already determined, fo that he is put to his audita querela to hinder the execution of the judgment. 2 Lutw. 1143. 1174.

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## Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

If on a judgment and a writ of error brought, the plaintiff in the original action brings debt on the judgment, and recovers a judgment thereon, and afterwards the first judgment is reversed on the writ of error, an audita querela may be brought for relief against the second judgment.

So, if an action be brought against A, for a trespass committed fimul cum B, and judgment be obtained thereupon, and afterwards the plaintiff release B.—A, may have an audita

querela on the release.

But if a scire facias was brought on a judgment, and the defendant has a release and omits to plead it to the scire fa-

cias, he shall not have an audita querela.

Where a defendant had matter which might have been pleaded to a fci. fa. and has lost the benefit of that by an award of execution upon a fcire feci returned, he is estopped for ever, and can never have an opportunity to take advantage thereof again: but if it was an award of execution upon two nihils returned, he may be relieved by bringing an audita querela: And the court will not even drive him to that, but relieve him on motion, unless the ground of his audita querela be a release, or some such foreign matter, which ought to be pleaded.

Judgment on scire facias, error coram vobis residen. brought, and the assignment of error was a matter of sact, contrary to the suggestion of the sci. fa. Issue was taken and sound for plaintist in error; and it was then moved, that the judgment might be reversed. Per Holt et cur. Error will not lie in this case, but an audita querela only; because the sact assigned for error is in the suggestion of the writ itself, and not in any of the proceedings in the cause. Carth. 282.

If one be taken in execution, and afterwards fet at liberty by the plaintiff, and then taken again upon the fame execution, he may bring his audita querela to be enlarged, for the execution was discharged; and being once discharged, is discharged for ever, and supposes a satisfaction.

Judgment for 500/. against the ancestor who pays it, and dies, not having taken a release or deed upon the payment. Resolved, that the heir may maintain an audita querela upon this payment, though no deed or specialty. 2 Reb. 455.

An administrator recovered in trover, counting of his own possession after administration committed; but before execution the administration was revoked, and the defendant F f 4 brought

# Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

brought audita querela, and adjudged it lay. For though of goods in his own possession he had no need to name himfelf administrator; yet the goods here are assets, and he is chargeable as executor de son tort, after administration repealed for the goods so taken in execution.—So, where baron and seme executrix recover, and the seme dies before execution, the baron shall not have scire facias. Vide 2 Keb.

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668. Cro. Car. 208. 227. 464.

The plaintiff had a verdict in trespass against two, and after the day at nist prius, and before the day in bank, in consideration of 101. released to one of the defendants.—On which the other desendant after the day in bank, but before judgment entered, to take advantage of the release, sued out an audita querela, put in bail, and declared as of the judgment entered.—The plaintiff in the original action to the declaration in audita querela pleaded nul tiel record, on which plea the plaintiff in audita querela moved, that the plaintiff in the original action might bring in the posses and enter the judgment, or that he should do it for him. Per cur. Let the plaintiff in the original action enter his judgment within such a time as of the day in bank, or let it never be entered, and let the suit on the audita querela stay. Ranfere v. Meredith and Baker. Pas. 26 Car. 2. I

The plaintiff, a feme fole, married after the interlocutory judgment, and before executing the writ of enquiry; and it was now moved to fet aside the writ of enquiry, and the inquisition thereon taken. But refused by the court. And the defendant was left to his audita querela. Bunb. 283.

The plaintiff, a feme fole, between interlocutory and before final judgment, married; and after the final judgment, the bustond and wife brought a scire facias thereupon, for the defendant to shew cause quare ex. non, &c. And then the defendant moved to have the judgment set aside; but the court resused to do it on motion, and put him to his audita

querela. Bunb. 282.

One lent money, and for security accepted a judgment; the money was paid within a day or two after it became due, and the party gave an acquittance, and promised to acknowledge satisfaction, and this was proved before the secondary; yet the plaintiff took the desendant in execution, and he remains in prison. Per cur. The proper remedy is by audita querela; but let the plaintiff appear here next

### Of profecuting an AUDITA QUERELA by the DEFENDANT in the Suit.

next term, to fnew cause why he should not acknowledge fatisfaction on record. Anon. Mich. 29 Car. 2.

If two executors fue execution for damages recovered by the testator, where one hath released, an audita querela lies

against both. Rol. Ab. 312. If A. hath judgment against B. for costs and damages, and releases to B. all executions, and after B. brings a writ of error, and thereupon the judgment is affirmed, and further costs given for the delay of execution, and A. takes B. in execution for the whole, upon an audita querela B. shall be discharged quoad the damages and first costs, but not quoad the second costs. Cro. Jac. 337. Rol. Rep. 11.

If two are bound in an obligation, jointly and feverally, and judgment is given against each in two several actions, one in banco, the other in banco regis, and after one is taken in execution in banco regis, and then an execution is taken in banco against the other by elegit, and lands and goods delivered in execution thereupon; he that is in execution by his body in banco regis, shall be delivered upon an audita querela, because the execution upon an elegit is a satisfaction. Hob. 2. Cro. Jac. 338. 2 Bulf. 97. Godb. 257. Rol. Rep.

But if A. and B. are bound in an obligation, jointly and severally, and judgment given against each upon several actions brought, and both taken in execution, and after A. escapes, vet B. shall not be delivered upon an audita querela; for though the obligee may have an action against the sheriff for an escape, yet, till he is actually satisfied, the other shall not have an audita querela; nor the obligee be compelled, whether he will or no, to take his remedy against the sheriff, who may die or be infolvent. Vide Bac. Abr. 3 Vol. 699, &c.

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ere xt Of profecuting an AUDITA QUERELA by the BAIL to the original Suit.

WHEN bail bring audita querela to be relieved from a judgment or execution had against them to answer the debt of their principal; and the writ of audita querela is allowed, they have no occasion to put in bail, unless the bail are in execution.

where judgment is had against bail upon a feire faciar upon default of their principal, and afterwards the original judgment is reversed, bail may be relieved by audita querela, for they have no other remedy, having no opportunity to

plead it. I Rol. Abr. 308.

Judgment in debt against H. who died, not having satisfied the debt or rendered his body, a scire facias issued against the bail; and after two nibils, execution was awarded, whereupon they brought an audita querela; and because no ca. sa. had been awarded against H. they had judgment. Gro.

El. 597.

The exoneretur which had been ordered to be entered by the court was not actually entered on the bail-piece [by the omission of the proper officer.] But the plaintiff himself was apprized of the furrender; though the attorney swore, that he, the attorney, had no notice of it.—The plaintiff's attorney not being apprized of the furrender of the principal, fued out scire facias's against the bail, who paid the money; but they were fued into London, where the original cause of action was, and not into Middlefex, where the furrender was made, and where the bail-piece remained. Upon both these irregularities, viz. the plaintiff's being apprized of the furrender and order of the court; and 2dly, The scire facius's being fued out into London, instead of Midddlefex, it was moved, that the fcire facias's might be fet afide for irregularity, with costs, and the money restored. - The court were clear as to both points, and made the rule absolute for setting the scire facias's aside, and restoring the money, but without cofts, as awarding costs would have been to no purpose;—the plaintiff, who was apprized of the furrender, being gone abroad; and the attorney, who was not apprized, not having acted with any defign to oppress. Bond v. Isaac. Burr. Rep. 4 tt. 409.

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## Of the Process in AUDITA QUERELA.

IT was said before, that the process upon an audita querela is of two sorts, viz. a scire facias and a venire facias.

The process of scire facias is proper when the party suing the audita querela is in actual custody, or when the writ it-felf is founded on record.

The process of venire facias is proper when the party is not in custody, but only brings his audita querela quia timet, or when the writ itself is grounded on a matter of fact. Salk. 92. Carth. 303.

If the original fuit were by original writ, there should be fifteen days at least between the teste and return of the process issued upon the allowance of the audita querela, and must be returnable on a general return.

But if the original fuit were by bill, (it seems) that fifteen days between the tests of the first scire facias, and return of the second scire facias, are sufficient.—i. e. Seven days between the tests and return of each writ, and not one ten, and the other five.

And the writ should be returnable on a day certain in

But even if the original fuit were by bill, and the process on the audita querela be a venire facias, I should apprehend that there ought to be fifteen days between the teste and return of that writ; because the second process issuing upon default thereto, is a distringues.

The defendant in the audita querela should be warned to

appear.

A. being taken in execution, brought an audita querela, tested 21st Nov. a scire facias issued and bore teste the 6th Nov. The defendant appeared and demurred, and shewed for cause, that the teste of the scire facias was before the audita querela. Sed non allocatur, for here the scire facias being but to compel the party to appear, and answer the audita querela, the appearance has helped the defect of the process; but upon a scire facias upon a judgment it may be otherwise, because another judgment is to be grounded upon it. Vaughan v. Lloyd, Hil. 20, 21 Car. 2.

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## Of Declaring, &c. in AUDITA QERELA.

If the defendant in audita querela appears upon the scire facias, venire facias, or distringues, the plaintist in audita querela declares; in which declaration the whole writ of audita querela is recited in the same manner as in a declaration in scire facias, with a beginning to this effect:

our OUR lord the king fent to his justices, \* assigned to hold pleas before the king himself; his writ closes in these words, to wit, George the third, &c." (and so recite the whole writ of audita querela.)

In the declaration in an audita querela, the better form is to recite the whole record of the recovery, or it may be recited generally, as "Quod cum quidam A. nuper scilicet, &c. implacitasset quendam B. &c. super quo he found bail, taliterque in eadem curia nostra processum fuit, quod prædictus A. recuperet, &c." Co. Ent. 87. b. c.

But if there is a variance between the audita querela and

the record, the writ abates. F. N. B. 104. R.

The declaration ought to comprehend only one gravamen, or at least, if it mentions several, it ought to rely upon one only, otherwise it will be double. F. N. B. 104. R. Cro. El. 809. Dy. 297. b. And the plaintiff ought to shew himself aggrieved. Ibid.

In the entry of the declaration, after the writ of audita querela is set forth, the plaintiff suggests the gravamen, and prays to be discharged, &c. Afterwards is set out the award of the scire facias or venire, &c. and the recognizance of bail (if the plaintiff was in execution and delivered on bail) then the return to the scire facias, or venire, and the desendant's appearance.

If the defendant confesses the matter alledged, the plaintist has judgment and discharge by confession; but if the defendant denies it, the parties proceed to issue in fact, or in law,

as in other cases.

No damages or costs can be given to a plaintiff in an

audita querela. See Dyer 194.

If the plaintiff in audita querela be nonsuited, though he may have a new writ of audita querela, he shall have no superfedeas to stay execution.

This is the form of beginning in B. R. In C. B. the form is thus, "OUR lord the king fent to his justices of the Brack," &c.

### Of Declaring, &c. in AUDITA QUERELA.

If the audita querela be brought while the money recovered on the first judgment remains in the hands of the Sheriff, and not paid over to the party, the court will make an order for it to remain there till the audita querela is determined. But it seems, that if the money on the first judgment is paid over to the party recovering it, there is no remedy for it.

But by Windham, just. Where judgment is had in an audita querela brought before the former execution done, the plaintiff in audita querela shall be restored to whatever he lost by the execution, which the court agreed, being founded on a release. Vide 1 Keb. 260. 245. 1 Sid. 74.

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## Of the Judgment in AUDITA QUERELA.

BY the process of venire facias, the plaintiff in audita querela may have distress infinite till the defendant appears.—But if the defendant does not appear and plead after a feire facias, and two nibils returned, there shall be judgment against him.

But if there is judgment after one nibil, it is error. R.

Yelv. 88.

If the defendant pleads, and afterwards makes default upon the feire facias ad audiendum judicium, there shall be judgment against him.

If there be judgment for the defendant in an audita querela, before he have execution upon his first judgment, he may afterwards pursue his execution upon that. I Vent. 264.

If the defendant in the first judgment was in execution before the audita querela, and in that there is judgment for the defendant, he shall pursue judgment in the audita querela, I Vent. 264.

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And herein of entering Process on the Roll to fave the Statute of Limitations.

THE statute 21 Jac. 1. c. 16. s. 3. for limiting personal actions, enacts, "That all actions of trespass quare clausum fregit, all actions of trespass, detinue, action survivore, and replevin for taking away of goods and cattle, all actions of account and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their sactors or servants, all actions of debt grounded upon any lending or contract without specialty: all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought, shall be commenced and sued within the time and limitation hereaster expressed, and not after, (that is to say;)

"Actions upon the case, (other than for slander) actions for account, actions for trespass, debt, detinue, and replevin for goods or cattle, and actions of trespass quare clausum fregit, WITHIN SIX YEARS next after the cause of such

actions or fuit, and not after:

And

"And actions of trespass, of assault, battery, wounding, imprisonment, or any of them, WITHIN FOUR YEARS next after the cause of such actions or suit, and not after:

"And actions upon the case for words WITHIN TWO

YEAR's next after the words spoken, and not after."

And by feet, 7. it is provided, "That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action fur trover, replevin, actions of accounts, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or shall be at the time of any such cause of action given or accrued, sallen or come, within the age of twenty-one years, seme covert, non compos mentis, imprisoned or beyond the seas \*; that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of sull age, discovert, of same memory, at large, and returned from beyond the seas, as other persons having no such impediments should have done."

<sup>\*</sup> A foreigner, who refides always beyond feas, is not bound by this statute, as the exception is general, and may reply the fact to the plea of the statute. 2 Blacks. Rep. 723,

## 448 Of the Statute of Limitations.

## And herein of entering Process on the Roll to

This statute bars the plaintiss action if he do not commerce it within the time therein expressed; or if disabled at the time the action accrued, if he do not commence it within the limited times after the disability removed from himself—but the 4 & 5 Ann. c. 16. s. 19. entitles the plaintiss, in case the desendant is beyond sea at the time the action accrues, to bring his action within the limited time, according to the stat. 21 Jac. 1. after the desendant shall be returned.

Both the flatutes of 21 Jac. 1. & 4 & 5 Ann. are express, that the party to be excused must be beyond the seas. And therefore the statute of limitations extends to persons in Scaland; for they are not beyond the seas. King v. Walker. I Blacks. Rep. 286. And therefore a plaintiff living in Scotland shall be barred of his action, if he does not commence it within the time specified by the statute.

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A'latitat is good to avoid the statute of limitations, without a bill of Middlefex previously sued.—So is a capias without an original. Macalf v. Burrowes, 14 Geo. 2. Ball. Ni. Pri. 151. Vide Stra. 736. And a capias is good evidence of a preceding original. Leader v. Moxon's. M. 14 Geo. 3. C. P. 2 Blacks. Rep. 925.

An attachment of privilege (though informal in being made on a general return) is a sufficient commencement of an action, to avoid the statute of limitations. Leadheater v. Markland. H. 17 Geo. 2. C. P. 2 Blacks. Rep. 1121.

Markland. H. 17 Geo. 3. C. P. 2 Blacks. Rep. 1131.

And a latitat sued in vacation, will by siction of law save the limitation of time, unless the desendant in his rejoinder set out the day on which the latitat issued. Lambert v. Witeley, E. 1760. K. B. Vide Ld. Raym. 432, &c. 386. 880. 553. For the true time of suing out a latitat may be averted against the teste of it. Johnson v. Smith. 1 Blacks. Rep. 215.

The process sued out with a view to avoid the flatute of limitations, must be carried to the Sherist's office, in order to be returned with a non est inventor, after which it must be entered on a roll in this manner:

As yet of the term of the Holy Trinity. Witness, William Earl of Mansfield.

"Middlefex, to wit. The Sheriff is commanded to take C. D. and E. F. if they may be found in his bailiwick, and keep them fafely, so that he may have their bodies before

## And herein of entering Process on the Roll to fave the Statute of Limitations.

before our lord the king at Westminster, on Wednesday next, after three weeks from the day of the Holy Trinity, to answer A. B. in a plea of trespass, and to have then there this precept. By bill. Stormont and Way. At which day, before our lord the king, at Westminster, came as well the aforesaid A. B. in his proper person, and offered himself against the said C. D. and E. F. in the plea aforesaid; and the Sherists, namely, Thomas Wright, and Evan Pugh, Esquires, Sherist of the county of Middlesex aforesaid, returned, that the aforesaid C. D. and E. F. are not, nor is either of them found in his bailiwick.

Roll.

This entry of a bill of Middlefex will serve to illustrate the practice upon other process, for if the process sued forth be a latitat or attachment of privilege in B. R. it must be set forth upon the roll, with the return, in the same form—and such process, when returned, must be taken to the signer of the writs in B. R. to file the same, and the roll carried to the clerk of the judgments to be entered and docquetted; the plaintist's attorney making out a docquet paper in this manner:

Entry of William Lyon, gentleman, one, &c.

Middlesex, to wit. Entry of a bill to save the statute between A. B. plaintiff, and C. D. and E. F. desendants.

Returnable, &c.

Rall

If in B. R. the process sued forth is an original or capias, the entry thereof, with the return, must be made out accordingly, and docquetted, such process when returned being filed with the filazer.

So, in C. B. if it be an original or capias, the same must be filed with the filezer, and the roll carried in and docquetted

with the clerk of the judgments.

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If a plaintiff would take advantage of process sued out in this manner; upon the defendant's coming into court afterwards, and pleading the statute in bar of the action, the plaintiff must shew that he has continued the writ to the time of the action brought, and must set forth that the first writ was returned. For if the defendant plead non assumpti infra sex sames ante exhibitionem bille, and the plaintiff tenders an issue thereon, and issue taken, the plaintiff cannot give the Vol. II.

## Of the Statute of Limitations,

And herein of entering Process on the Roll to fave the Statute of Limitations.

latitat in evidence; for a latitat may either be the commencement of the action, or only process to bring the defendant into court; and as process it may be fued out before the

So that the plaintiff to such plea, instead of tendering iffue, should reply a latitat, fued out at such a time, and shew the same returned; then continue the same in his replication to the process on which the party comes in averring, that the first process sued out and returned, was sued out with a view to exhibit his bill, or declare for the fame identical cause of action; and that the same was sued out within the time limited by the flatute.

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The continuances in fuch case, where the plaintiff is driven to fnew the writ continued may be entered upon the

roll at any time.

Neither the king, nor ecclefiaftical person, are within the

statute of limitations. 11 Rep. 74.000 1200 olon bis di

one fues out an original, or takes out a latitat in a perfonal action within the time limited by the statute, and upon his latitat hath a non eft inventus returned by the Sheriff, and enters his writ upon the roll, and files it, though he doth not declare against the party within the time limited by the statute, the action shall be said to be brought in due time. 2

Vent. 192, 193. 259.

If an action is properly commenced in an inferior court within the fix years, and the defendant removes it by habeas corpus into the King's Bench, the statute of limitations will be no bar to the plaintiff in the King's Bench, though fix years were elapsed after the cause of action accrued, and before the removal of the fuit into the King's Bonch. Bruin. Chapman. Mich. 16 Car. 2. 1 Sid. 228. 1 Lev. 143 Vik Ld. Raym. 1427. That is, if plaintiff replies the fuit below, and shews that to have been within the fix years. 2 Salk. 424.

In assumptit, defendant pleaded the statute of limitations, and the plaintiff replied that defendant was a parliament man, &c. and the plea was overruled; because one may file an original against a parliament man, and continue it down without any breach of privilege, here being no actual molestation of his person or estate, and that this should be so is of absolute necessity, in order to save the bar of the statute; for fuch case not being provided for by an exception, the plaintiff would be barred of his action, though he could not file an original, Lev. 111. Mod. 145. 2 8alk. 512. Show, 99. Carth. 137. Ld. Raym. 1113. Where

## Where PLAINTIFF shall recover Costs.

A T common law, costs or expensa litis were generally included in the damages given by the jury; but as they often omitted to give adequate damages, it was enacted, that,

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aid and besail, shall have damages.—And

demandant shall have the \* costs of the

"demandant shall have the costs of the write purchased, together with the dama- Stat. of Glauc.
"gest and this act shall hold place in all 6 Edwe 1. c. 1.

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" And every person shall render damages and addison where land is recovered against him, and troop add

"upon his own intrusion, or his own act." would be nevert

This statute only gives rosts in those actions mentioned in it, and those other actions, in which the plaintiff before the making of it recovered damages; so that, where damages were not recoverable before, no costs are hereby given.—And though a subsequent act gives damages, where none were recoverable before; yet, if costs are not also given, no costs shall be recoverable.

For instance, in waste against tenant for life, years, or in dower, treble damages are recoverable by the Stat. of Glouc. 5. but no costs; because waste did not lie before, against such tenants, and no costs are given by that act upon recovery of domages.

So Westm. 2. e. 5. s. gives damages in quare impedit, and darrein presentment in two cases; but as there is no mention of costs, costs are not recoverable, because damages were not given therein, before the above Statute of Gloucester.

So no costs in an action on 5 Edw. 6. c. 14. of engrossers. So no costs in an action on 1 & 2 P. & M. c. 12. for driving a distress out of the hundred.

So no costs in an action of scand. mag. because such action did not lie at common law; and the statute which gives such action, makes no mention of costs.

Coffs, meant by this or any subsequent statute, are the exto/a little, such as shall be allowed upon taxation of costs by the master or prothenotory; but plaintiff is not to be allowed money expended on account of himself, or for the loss of his own time.

Where

### Where PLAINTIFF shall recover Costs.

So no costs in formedon, or on a writ of right, because no damages recoverable therein; nor are damages given therein by the Stat. of Gloucester.

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So no cofts in an attaint. a milla layalist

But where a certain fum is given by a subsequent statute, to a party injured in an action wherein damages were recoverable before the statute of Gloucester, the plaintiff shall also have costs, though costs are not mentioned in such subsequent statute; as in an action by the party injured, on the riot act, I Geo. 1. c. 5.

So if fuch subsequent statute give double or treble damages

By perforal artisms, the flature income luch actions as dilt, affinish, affinish, tropolis a boxes and the like actions; but not rigod, where the interest or rule to land might come in question, though collaterally; as incalastification, the action of action, income, as a fisher, under a retervaling, in a fisher, under a retervaling, in a

leafe, and affer joined upon detendants being projet of not

in fuch action, cofts shall be doubled or trebled also,

and plaintiff recovers dantagets weder to industry if realing a continue or organization of the continue to be granted swimmile plainting to more collections. than dam's gest the great the mount of the mount of the state and the state of the " In actions for flanderous, error, if de"mores are given under for fortings; at yearse its
" plannid that have no more rediction (6) (2) " damages" This statute means words only in themselves actionable without perful damager. Theirefore interprets not actionable in themlelves, but only actionable by reason of feetial dangers the plaintiff, though he recovers duringes under forty fining is · thall nevertheless have full to list But for words in themielves achionable, almough planning lays period domages, if the jury gives hum lets daining than forty inflings, he mail have no more costs than damages Even if detendant pleads doubte and justines, and there be a general verdich against him, in seems, if plaintist recovers less than forty stellings, he thall have no more colls than damages under this act, if the wormen themfelves were actionable. stadwote: Slander of title, is nother without the words, nor-the hearing of this ach; the frecial damage heing in fach case the gift of the action.

The certificate on this flotate may be granted after trial.

8 3 DO

Where PLAINTIFF shall have no MORE COSTS than DAMAGES, if the Damages found are under FORTY SHILLINGS.

" I F upon any personal action, not being for any title or interest of land, nor con-

" corning the freehold or inheritance of lands, nor for any battery, it shall be \* cer-

" lands, nor for any battery, it shall be \* cer" tified by the judge before whom tried,

" that the debt or damages recovered, shall " not amount to 40 shillings or above, the

" plaintiff shall have no more costs, than the

" debt or damages recovered."

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By personal actions, the statute means such actions as debt, assumpted, assault, trespass de bonis, and the like actions; but not trespass where the interest or title to land might come in question, though collaterally; as in a justification by a bailist or agent, in taking, as a distress, under a reservation in a lease, and issue joined upon defendants being bailist or not, and plaintist recovers damages under 40 shillings, it seems a certificate ought to be granted to intitle plaintist to more costs than damages.

"In actions for flanderous words, if da=
"mages are given under forty shillings, 21 Ja. 1.c. 16.
"plaintiff shall have no more costs than f. 6.
"damages."

This statute means words only in themselves actionable without special damages. Therefore for words not actionable in themselves, but only actionable by reason of special damage, the plaintiff, though he recovers damages under forty shillings, shall nevertheless have full costs.

But for words in themselves actionable, although plaintiff lays special damages, if the jury gives him less damages than forty shillings, he shall have no more costs than damages.

Even if defendant pleads double and justifies, and there be a general verdict against him, it seems, if plaintiff recovers less than forty shillings, he shall have no more costs than damages under this act, if the words in themselves were actionable.

Note: Slander of title, is neither within the words, nor the meaning of this act; the special damage being in such case the gift of the action.

<sup>\*</sup> The certificate on this statute may be granted after trial.

G g 3 Where

Where PLAINTIFF shall recover FULL COSTS, thought the DAMAGES given are under FORTY SHIELINGS, and where not.

co TN all action of trespass, affault and but no stutal sid I. tery, and other perforal actions, wherein ! [ and more the judge at the trial shall not certify anual nad show som der his hand upon the back of the record, o but your you that an affault and battery was fufficiently show againsh ban proved by the plaintiff against the defendante or that the freehold or title of the od dum stutel was chiefly in question, the plaintiff in 22 & 23 fuch action, if the jury find damages Car. 2. c. 9. coffs than the damages found; and if " more costs shall be awarded, the judgment shall be void, and defendant ac-"quitted from the fame, and may have apply a noun this his action against the plaintiff for such and an analysis vexatious fuit, and recover his damages and a noque has " and costs of such his suit." he hill extends to all

This statute, notwithstanding the words "other personal "actions," extends only to actions of trespass quare clausum fregit, and assault and battery; because the intention was not to prevent a plaintiff from recovering full costs in any action, except such wherein it was possible for the judge to certify that an assault and battery were sufficiently proved, or that the freehold or title of the land was chiefly in question; which certificate can be but in those actions.

On a writ of enquiry on this statute, if damages under forty shillings are given by the inquest, the plaintiff shall have full costs, because this statute is confined to the ease of damages found by the jury at the trial; and does not, like the statute

21 fa. 1. c. 16. extend to both cases. han a pala and midas in the

After removal of a cause from an inserior court by defendant, if damages are given under forty stillings, though the judge do not certify, plaintiff shall have full costs.

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<sup>•</sup> This statute, and all statutes preceding it, for prevention of frivolous and vexatious suits in the superior courts, are extended to the courts of great sessions in Wales, and courts of the counties palatine, by 11 5 12 W. 3. c. 9.

Where PLAINTIFF shall recover BULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not

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This statute only prevents the court, [without a certificate from the judge,] but not the jury at the trial, from giving more costs than damages, if under forty shillings; therefore the jury may find costs to more than forty shillings, though they find damages under that sum.

The certificate, to entitle plaintiff to full costs upon this statute, must be granted at the trial; and must be, that an assault and battery; or that the freehold, or title of the land mentioned, was chiefly in question.

But in crim. con. with plaintiff's wife; if damages under forty shillings, plaintiff shall have full costs without a certificate; because the assault is not the gift of the action, but the crim. con:

Note: A plaintiff, by the 43 of Eliz. is deprived of full costs upon a judge's certificate—but by the 22 & 23 of Car. 2. plaintiff, in the actions therein mentioned, is entitled to full costs upon a judge's certificate, if the damages found are under forty shillings.

The first extends to all personal actions, [except for a battery, or for title or interest in land, concerning freehold, or inheritance] the latter only to assault and battery; and trespass, where freehold or title is chiefly in question.

that an assault and battery was proved, or that the freehold or title was chiefly in question, the plaintiss [if the defendant has not obtained a certificate on 43 of Eliz. to prevent costs] shall recover his full costs, notwithstanding damages under forty shillings without a certificate; as in debt, assumptit, trover, trespass for taking his horse, bull, or sheep—or for cutting or breaking his net,—or for taking his goods;—trespass for spoiling his cost guilty of the impounding his cattle.—(if defendant is found guilty of the impounding) or for breaking his close, and taking away his corn (if defendant is found guilty of cutting and taking away his corn.) But in trespass for breaking his close, and digging therein;—or for entering his

But if the defendant is acquitted of cutting and taking away the corn, or of impainding the sattle, then the case is within the statute of Car. 2. and without a certificate plaintiff will not have full costs.

Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

bouse and breaking the door,—or for fixing stakes on his ground,
—or entering his close, and throwing down sences and pales,—
or for entering and building a wall on his close;—if damages
are given under forty shillings, plaintist shall not have his full
costs without a certificate from the judge at the trial; because in
all such cases, the freehold or title to the land or house, men-

tioned in the declaration, is in question.

In all cases however, if it appears upon the pleadings that the freehold or title was in question, there needs no certificate to entitle the plaintiff to full cofts, though the damages are under forty sbillings; because the certificate could say no more than what appears on the record. As if it appears on the pleadings that a view was granted, or that defendant justified for a right of way, and plaintiff replied extra viam: for on fuch issue, the breadth of the way, and consequently the title is in question. Nor in affault and battery, if defendant justifies, for then he admits the battery. So, if plaintiff declares on a clausum fregit in one count, and for an injury to a chattel, or for taking his hog, or for an afportation in another count, and there be a general verdict, and damages under forty shillings, he shall have full costs without a certificate; because, upon the fecond count, it was not in the judge's power to certify. - So, if trespass on land and an asportation be charged in one count, and there be a general verdict and damages under forty shillings.—So, if a trespass on land and chasing his cattle be charged:—So, if it be for breaking and entering his free warren, and killing and chafing his hares, conies, &c. But in trespals for breaking and entering a house, breaking window-shutters, and spoiling the bolts thereto; -or for breaking and entering a bouse, making a noise, continuing there and making plaintiff give, &c .- Or, for breaking close, cutting down, lopping, and spoiling trees; Or, for trespass in his close with cattle, and spoiling the fruit there found; Or, for breaking and entering a house, keeping plaintiff out of possession with a per quod; -Or, for breaking and tocking up a bouse, detaining goods therein; Or, for assault and battery, throwing him down and thereby spoiling his cloaths; in all these and the like cases, if a general verdict and damages under forty shillings are given, there shall be no more costs than damages, without a certificate.

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Where PLAINTIFF shall recover FULL COSTS, though the DAMAGES given are under FORTY SHILLINGS, and where not.

"Whereas great mischiefs do ensue by " inferior tradelinen, apprentices, and other " diffolute persons, neglecting their trades and employments, who follow hunting, a filling, and other game to the ruin of "themselves and damage of others.—It is " enacted, That, if any fuch person shall " prefume to hunt, hawk, fish or fowl, unless in company with the master of 455W.&M. " fuch apprentice, duly qualified by law) c. 23. f. 10. of fuch person shall be subject to the penal-" ties of this act, and may be fued and pro-" fecuted for their wilful trespass, in such their coming on others land; and if found " guilty thereof, the plaintiff shall not only " recover his damages thereby fultained, be of 1947 to 1947 " but his full costs of fuit: any former law " to the contrary notwithstanding."

Who is an inferior tradesman, and who not within the meaning of this act, is still undetermined—though it has been adjudged, if a person be an inferior tradesman, as a clothier, &c. it matters not what qualification he may have in estate, but if found guilty of such trespass, he shall be liable to full cofts.

But it has been adjudged in trespass for hunting, laid upon this statute, against defendant as a diffolute person, &c. if the plaintiff proves only the trespass, but not the circumstances under the statute, and has a verdict, he shall recover as in common actions of trespass, viz. no more costs than damages, if the damages are under 40 shillings: for not proving the special circumstances, the action is then no other than a common action of trespass.

The statute 22 & 23 Car. 2. before mentioned, being construed so strictly by the courts, that in trespass quare clausum fregit the judges could not certify, unless the freehold or title were in question; plaintiffs were frequently deprived of costs if they recovered but small damages, when the trefpass they complained of was wilfully and maliciously committed. To remedy this, it was enacted, that

Where PLAINTIFF shall recover FULL COSTS though the DAMAGES given are under FORTY SHILLINGS, and where not. TRO H

" In all actions of tre	has in any of his of the no
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	al of the cause, it that notice at
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defendant inall be to	und guilty, was a listed so but to
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Every trespass is wilful, within the meaning of this act, where the defendant has notice, and is especially forewarned, not to come on the land; as every trespass is malicious though the damages may not amount to forty shillings, where the intent of the defendant plainly appears to have been to harrass, vex, and distress the plaintiff: so that every minute trespass, that is not accidentally, but ill-naturedly committed, is a malicious trespass.

But note, The certificate on this statute must be made by

the judge in court at the trial, otherwise it is void.

To discourage plaintiffs from suing in the superior courts for trifling matters, after reciting an act for the establishment of the court of requests in the city of London, for the recovery of finall debts, it was enacted,

"That if any aftion of delt or upon	ATTENDED TO SELECTION OF THE SELECTION O
"That if any action of debt, or upon	foilings, yet if
"the case upon an assumpsit, for the reco-	joilings, the rea
" very of any debt, profecuted against any	the action, the
of the persons * aforesaid, in any of the	make his fireen
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" where, out of the faid court of requests, it	3 Fat. 11 c. 15
" shall appear to the judge or judges, that	fuit, and detail
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" to the fum of forty shillings, and the de-	the defendant c
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That is, persons inhabiting within the said city, being tradefmen, viauallers, or labouring men. es own

Where PLAINTIFF shall recover FULL Costs, though the DAMAGES given are under FORTY SHILLINGS, and where not.

" own oath, to be allowed by any the " judge or judges of the faid court where " the action shall depend, that at the time " of commencing such action, defendant " was inhabiting and refiant in the city of " London, or liberties thereof; the faid judge or judges shall not allow to the said plain-" tiff any costs of fuit, but shall award the " plaintiff to pay so much ordinary costs to " the defendant as he shall prove before " the faid judge or judges it hath truly coft " him in defence of the faid fuit." this act.

3 Fac. 1. 6.15

Since the making of this statute, courts of requests, or conscience, have been erected in various places, as in Westminfer, Southwark, Briftol, Gloucester, &c. and some statutes give double cofts to the defendant, if fued in a superior court for a debt under forty shillings.

If the defendant does not plead the statute in bar of the action in the superior court, but suffers a verdict to go against him, he may take advantage of fuch statute by entering a suggestion on the roll.—But if he lets judgment go by default, he precludes himself from taking any advantage of the statute, and cannot make a fuggestion on the roll to have his costs; for when an inquest is taken by default, the defendant is out of court to all purposes but having judgment against him.

Notwithstanding plaintiff declares for more than forty fillings, yet if the jury give him a verdict for less than forty fillings, the real debt or demand at the commencement of the action, the defendant [if a person within the act] may make his fuggestion on the roll to have his costs, and the costs of the fuggestion shall also be included.—But if the original debt was above forty shillings at the commencement of the fuit, and defendant pleads, or gives in evidence a fett-off, and plaintiff has a verdict for the balance under forty shillings, the defendant can make no suggestion.—Otherwise, if defendant gives in evidence, payment which reduces the debt under forty shillings.

If defendant would take advantage of fuch statute, it must be by motion for leave to enter a suggestion on the roll, which motion must be made on an affidavit of the fact on the part viduallers, or laborring men.

of the defendant.

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When the suggestion is entered with leave, the method is to grant a rule; and unless plaintiff pleads thereto within the time limited, or demurs, the allegation of defendant in his fuggestion is taken pro confess, and the officer will allow the costs, whether fingle, double or treble, as the statute directs.

Note, These statutes do not extend to cases where executors " if plaintiff in any action, bill, or are defendants.

st plaint of respass, upon the flature of " Rich. 2 .- or of debt or covenent upon any " specialty, or upon any cyntract supposed " to be made, or of detinue of any goods a or chartels on a supposed right of proto perty, or of account, upon the cafe, or " upon any flature, for any offence or wrong " perional supposed to be done, after appearence of afferdant be nonfuited; or that " any verdich happen to pais by layviul trial a against the plaintiff, then the oriendant in single his collection in the property in the state of the collection of t " to be affested and taxed by the court, and " shall have fuch process and execution for " the recovery and having of his cotts of " the plaintiff, as fuch plaintiff might have " had againft the defendant, in case judgment " had been given for the plaintiff?"

" Perfons fuing in farma pauperis in such case, to be otherwise punished."

The flature 24 Hen. 8. c. &. excepts plaintiffs (uling fire the use of the king from paying costs, under the above stetute, in case of nonfuit, or versits against them.

The above flatute specifying only actions of trespais on lands, acht, covenant, detinue, account, case, and when flatules for offences or perfonal wrongs, was extended, to give defendant costs after a quifait or 4 fat, 1 . c bridW iill for him in trefpafs or ejectment, s and every other action wherein plaintiff or " demandant might have costs upon ob-

" taining judgment."

### Where DEFENDANT shall recover Costs.

"IF any chief lords do maliciously im-plead feoffices, faining this case, namely, " where the feoffments were made lawful, " and in good faith, then the feoffees shall have their damages awarded, and their berge, 52 Hen. " fion of their aforesaid plea, and the plaintiffs thall be grievoully punished by amer-" ciament."

Stat. of Marle-

"If plaintiff in any action, bill, or " plaint of trespass, upon the statute of " Rich. 2 .- or of debt or covenant upon any " specialty, or upon any contract supposed " to be made, or of detinue of any goods " or chattels on a supposed right of pro-" perty, or of account, upon the case, or " upon any flatute, for any offence or wrong personal supposed to be done, after ap-" pearance of defendant be nonfuited; or that " any verdict happen to pass by lawful trial against the plaintiff, then the defendant " shall have judgment to recover his costs, " to be affeffed and taxed by the court; and " shall have such process and execution for " the recovery and having of his cofts of " the plaintiff, as fuch plaintiff might have " had against the defendant, in case judgment " had been given for the plaintiff."

23 Hen. 8. 6

"Persons suing in forma pauperis in such case, to be otherwise punished."

The statute 24 Hen. 8. c. 8. excepts plaintiffs suing for the use of the king from paying costs, under the above statute, in case of nonfuit, or verdict against them.

The above statute specifying only actions of trespass on lands, debt, covenant, detinue, account, case, and upon statutes for offences or personal wrongs, was extended, to give defendant costs after "nonfuit or 4 fac, 1. c. 3. werdiet for him in trespass or ejectment, " and every other action wherein plaintiff or " demandant might have cofts upon ob-" taining judgment."

### Where DEFENDANT shall recover Costs.

If judgment is given for defendant upon a special verdiet,

it is within these acts, and he shall have cofts.

If plaintiff is nonfuit, or defendant obtain a verdict on the g Geo. 1. (the riot act) the defendants thall have costs, because the plaintiff, if he had obtained judgment, would have been invited to costs. been intitled to cofts.

The foregoing flatutes extend only to the cases of nonfuit or verdiel; but to prevent malicious attachments and arrests by latitat, alias, and pluries capias in the King's Bench, and by process in the Marshalfea court, and other inferior " verdist, he or they thail recove

"That as often as any person shall fue, sielnu sind to " " or cause or procure to be fued forth, ed that! " any of the writs or process before men! I sint sitt sett rate " " tioned, againft any perfor, by which the broser of " fuch person be arrested, or to which he sen not shuso " " fhall appear upon the return, and put in abde to the " " bail, that then, if the party fuing do not 8 Eliz. c. 2. f. within three days after fuch bail taken, 200 minus to the of put into the fame court his declarationor if after declaration had and put in, the plaintiff shall not profecute the same with effect, but shall willingly delay or mo yes if " et discontinue his suit, or become nonsuit and a as as as as as thereon, the judges shall award defend- noun minimal " ant his cofts, &c. mabasmob

There are like clauses for the inferior courts therein mentioned, but the court of Common Pleas is not within it.

" Unless plaintiff, who has fued process to aid 1940001 " out of the King's Beneh and Common Pleas, and amai and ?" 44 shall put in his declaration against deer fendant in personal actions and ejectment, 13 Car. 2. A.2. before the end of the term next after apse pearance, a nonfuit may be entered, and defendant shall have coffs, to be levied as provided by the flat. 23 Hen. 8. don't no it bes allos of

This statute does not extend the provision in the 8 Eliz. above-mentioned, in case of a discontinuance in the King's Bench to the court of Common Pleas; and the reason for the emission seems to be, that in the Common Pleas a plaintist and the realon affigned was, that

### Where DEFENDANT shall recover Costs.

could not discontinue without leave; in granting which, the court always annexed the condition of paying costs.

The statutes before-mentioned, only give a defendant his costs, upon plaintiss's discontinuance, not declaring in time, upon being nonsuited, and upon a verdist against him.—So that there were many cases still unprovided for; and first,

Where feveral persons shall be made defendants in trespals, affault, false imprifhall upon trial thereof, be acquitted by

" verdict, he or they shall recover his costs " of fuit, unless the judge before whom the 8 & 9 W. 3.

" cause shall be tried, shall immediately ". II. J. I. " after the trial, in open court, certify upon " the record, that there was a reasonable

" cause for making him or them defend-

" ant or defendants." has make addition asogge usal

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From the words of this statute, it extends only to trespass vi et armis and ejectment, not to trespass on the case, or replevin; for every statute giving costs is to be construed firictly, costs being in nature of a penalty.

" If any one shall commence or profe-" cute an action in any court of record, " wherein upon any demurrer, either by plaintiff or defendant, demandant or

" tenant, judgment shall be given against . II. f. 2. " fuch plaintiff or demandant, the defend-

" ant or tenant shall have judgment to " recover his costs, and have execution for a signal alba !!

" the same by ca. fa. fa. or elegit. A small sold to the

This statute only gives costs to defendant if judgment upon demurrer is given for him when the demurrer is to the merits, and not when the demurrer is to a plea in abatement; for if on a demurrer to a plea in abatement, the plaintiff has judgment, quod respondent ouster, the plaintiff is not entitled to costs; and if on such demurrer, the defendant has judgment, either quod breve or billa caffeter, or quod quærens nil capiat, he is not entitled to costs.

It has been held, that quare impedit is within this act, but that formedon is not, notwithstanding the words " de-"mandant or temant;" and the reason assigned was, that

### Where DEFENDANT shall recover CosTs.

in formedon, the demandant could not recover costs, if he had a verdict; nor could the tenant, if he had a verdict, or the demandant was nonfuited. Ergo, this statute could not extend to give costs to the tenant on a demurrer in this action, by which no costs were otherwise recoverable by either party.

" Defendant or tenant in any action, or any plaintiff in replevin, may, with leave " of the court, plead as many feveral mat-" ters, as he shall think necessary for his defence-provided, that if any fuch matter shall, upon demurrer joined, he ad-" judged insufficient, costs shall be given at " the discretion of the court; or if a vera dist shall be found upon any iffue for er plaintiff or demandant, costs shall also be given in like manner; unless the judge who tried the issue shall certify \*, that the defendant or tenant, or plaintiff in er replevin, had probable cause to plead such matter, upon which the faid iffue shall be " found against him."

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Note, This statute does not extend to qui tam actions, so as to give defendant liberty to plead double in them. Nor to plead double in any case against the crown. Nor does it extend to plead double matters which shall have different trials.

In an action for crim. con. not guilty, and not guilty within fix years, were pleaded, iffue on the first, and demurrer to the second. The issue was tried first, and plaintist had a verdict for fifty pounds. The demurrer was afterwards argued, and desendant had judgment thereon. Desendant in this case, had his costs of the demurrer, and neither had the costs of the trial. For though plaintist had a verdict for damages, the judgment on the demurrer shewed he had no right of action; and desendant had no right to the costs of the issue, that being sound against him.

In trespass, there was not guilty, and two special pleas; to which plaintiff demurred, and had judgment, but upon the issue he was nonfuited. And it was ordered, that the

This certificate may be made after trial,

#### Where DEFENDANT Shall recover Costs.

costs of the demurrer be taxed for the plaintiff, and so much as they should amount to, be deducted out of the costs of the nonsuit for the defendant.

Three counts in trespass, and a justification to each; issues joined, and two found for defendant, the third for plaintiff.—This case is not within the act, and plaintiff intitled to costs on the whole declaration.

In replevin, plaintiff pleaded two pleas, issues joined; one found for plaintiff, the other against him, and no certificate. Held that defendant is intitled to the costs of the issue found for him.

Avowant, though not named in the act, feems to be within the meaning of it; if, therefore, one or more issues be found for him, and there is no certificate that plaintiff in replevin had probable cause to plead such double plea, the avowant shall have the costs of that issue which is found for him.

On issues joined on not guilty, and a special justification in trespass, plaintiff had a general verdict, and a penny damages. No certificate that defendant had a probable cause to plead the special matter. Here it was held, that plaintiff is not intitled to the costs of the justification. For by the state of Anne, when the judge does not certify, that defendant had probable cause to plead several matters, and verdict thereon be for plaintiff, costs are to be at the discretion of the court. And when there is no certificate, on the 43 of Eliza (when plaintiff recovers damages under forty shillings) the plaintiff shall not have costs of any plea pleaded with leave of the court, although issue thereon be found for him, and the judge have not certified that defendant had probable cause.

Note, The court of King's Bench does not allow plaintiff his costs as to any issue which is found for defendant.—But the court of Common Pleas do allow plaintiff his costs as to all the issues, if any are found for him, though one or more be found for defendant.

for damages, the judgment on the demorrer thewed he had no vigite is action; and delendant had no tight to the cells

Les trespals, there was not guilty, and two forced pleas; to which plaintiff demured, and had judgment, but upon the iffur his was moduled. IAnd it was ordered, that the

of the disc, that being found against him.

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Of Costs where a Verdict or Judgment is for Part, in feigned Issues, where Money is brought into Court, and upon Amendments.

I f in assumpsit against two, one suffers judgment by default, and the other pleads non assumpsit, and such issue is found for him, that defendant shall have costs; and as his plea went to the whole demand, plaintiff cannot have costs of him who suffered judgment by default.

So if in covenant against two, and judgment by default against one, and the other pleads to issue, and it be found for him—he shall have his costs, and plaintiff neither damages

nor costs against him by default.

But if judgment on demurrer be for defendant on one count, and verdict for plaintiff on an iffue to the other count, plaintiff shall have costs as to the iffue, and defendant no costs on his demurrer.

#### As to Costs on feigned Iffues.

If three feigned issues are ordered, and there be a verdict on the material one for defendant, and on the others for plaintiff, then, if in C. B. plaintiff shall have costs of all the

issues; but it seems otherwise in B. R.

The rule is, that costs upon feigned issues abide the event of the verdict; that is, if they are ordered by a court of law, if costs are not mentioned in the rule ordering the feigned issue. But if a feigned issue is ordered by a court of equity, costs do not follow the verdict, because the matter goes back to equity.—However, if a feigned issue is ordered on a criminal case, costs of the issue only will attend the verdict, and not the prior costs—as those on the rule why an information, or attachment should not go.

#### As to Costs, where Money is brought into Court.

A rule to bring money into court is feldom granted without annexing the condition of paying costs. But on particular circumstances, the court will grant the rule without the condition, as where a plaintiff keeps out of the way on purpose to avoid a tender of rent.

If plaintiff takes the money out of court upon a plea of tender, the defendant is entitled to costs.—So if plaintiff proceeds afterwards, and then moves for leave to take the money out of court, the court will not grant it, without paying defendant his costs subsequent to bringing it in.

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Of Costs where a Verdict or Judgment is for Part, in feigned Issues, where Money is brought into Court, and upon Amendments.

Where plaintiff does not take the money out of court, but proceeds, the amount of the money brought in is struck out of the declaration, and paid out of court to the plaintiff.—And though he proceeds, he will not be permitted to give evidence as to that money.—And if he does not recover more he is not intitled to costs.

The old form of the rule for bringing money into court, upon condition of paying costs, is in general still adhered to in the King's Bench. So that if plaintiff takes the money out, the costs not being paid, that court will not grant an attachment.—Though in such case plaintiff may proceed for want of the costs being paid, and will, in case of a verdict, (even for a lesser sum) be entitled to his whole costs.

Whereas in the Common Pleas, the old form has been so altered as to be obligatory on defendant to pay the costs; and if not paid when the money is taken out, that court will grant an attachment.

#### As to Costs upon Amendments.

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Upon leave given to a party to amend, the condition of paying costs is usually annexed to the rule. But in some cases, where the amendment is for a mere vitium clerici, the courts will grant leave to amend without costs. However, upon the rule to amend, with the condition annexed, the courts will not suffer one party to load the other (to whom leave has been given to amend upon condition) with any other costs, than such as are necessarily occasioned by the amendment.

If leave is given to amend the record after error brought, it is always on paying costs of the amendment, and writ of error; that is, if plaintiff in error do not proceed afterwards. But if he do proceed, then the court will not oblige defendant in error even to pay the costs of the amendment; because it is evident, that plaintiff did not entirely rely upon the error which has been amended.

Of Costs for not executing a Writ of Enquiry, Delaying Trial, and not proceeding to Trial pursuant to Notice.

COSTS for not executing a writ of enquiry pursuant to notice given, are not founded upon any statute, but upon rules of the respective courts. "That where notice of executing a writ of enquiry is given, and not countermanded in time, \* defendant shall be entitled to costs, in like manner as when plaintiff does not proceed to the trial of an issue after notice given."

"Where any iffue shall be joined in any " court of recordat Westminster, Great " Seffion of Wales, Great Seffion of Chef-" ter, Common Pleas of Lancaster, or " Common Pleas of Durham, and plain-" tiff neglects to bring fuch issue to be tried, " the judge or judges of fuch courts re-" spectively may at any time after, upon " motion in court, (due notice being given " thereof) give like judgment for defendant as in cases of nonfuit; unless such judge " or judges shall, upon just cause and rea-" fonable terms, allow any further time for " the trial of fuch iffue; and if the plain-" tiff shall neglect within the time allowed, " then fuch judgment shall be given as es aforesaid.

14 Geo. 2. c. 17.

" Provided, That judgment given by this act shall be of like force and effect as judgments upon nonfuit, and of no other force or effect.

" Provided also, That defendant shall upon such judgment be awarded costs, where he would have been entitled to

" the same upon nonfuit."

An executor, although judgment as in case of a nonsuit be given against him, is not liable to costs within this act, because he could not be liable in case of a nonsuit at the trial.

<sup>•</sup> Vide the first volume, as to notice and countermand of executing a writ of enquiry, trial, &c.

Of Costs for not executing a Writ of Enquiry, delaying Trial, and not proceeding to Trial pursuant to Notice.

It has been faid that judgment, as in case of a nonfuit, cannot be given on this statute, unless all the defendants apply for it—but there seems no reason for this.

A qui tam action is within this statute.

Defendant in replevin ought not to have judgment as in case of a nonsuit, being himself an actor. [Vide more under title, "Judgment, as in case of a nonsuit, for not proceeding

to trial," in the first volume.]

By rules 1654, if plaintiff give notice of trial, and do not proceed, defendant upon motion is to have the costs of his attendance—unless plaintiff give warning in convenient time, or shew cause in excuse; but to ascertain the time it was enacted,

"That in case any party shall have given notice of trial at any affize, or at any sitting in London or Westminster, where the desendant lives 40 miles from the said

" cities respectively, and shall not after-

" wards countermand the fame in writing, at least fix days before such intended trial,

" every such party shall be obliged to pay the like costs and charges as if such notice

" had not been countermanded."

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14 Geo. 2. c, 17. f. 5.

Note, By rules 1654 it was settled, that in causes in London and Middlesex, if defendant lived within forty miles, eight days notice must be given; if defendant lives above forty miles, then fourteen days notice; but the statute 14 Geo. 2. enacted, that ten days notice at least must be given, whether in town or country; and as there are not negative words in it, the old practice of giving fourteen days is still adhered to, when defendant resides above forty miles from town.

Within this statute a defendant is liable to costs for not

proceeding to trial by proviso, pursuant to notice.

Note, The first part of this statute gives judgment as in case of a nonfuit, and costs against plaintiff for not proceeding to trial after issue joined—the latter gives costs for not proceeding to trial, pursuant to notice, not countermanded in time,

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Of Costs for not executing a Writ of Enquiry, Delaying Trial, and not PROCEEDING TO TRIAL PURSUANT TO NOTICE.

So that if plaintiff neglects to go to trial after iffue joined, defendant may move for judgment, as in case of a nonfuit against him. And if he neglects to try after notice not countermanded, defendant may apply for his costs in not proceeding to trial. But defendant cannot have both remedies, the costs as of a nonsuit, and the costs of not going to trial; but must make his election of one or the other.

An executor or administrator is not liable to pay costs upon a judgment against him as in case of a nonsuit; [because upon a nonsuit, if he was obliged to sue as executor or administrator, he would not be liable to pay costs] but he shall pay costs for not proceeding to trial pursuant to his notice. So

he shall pay costs of a nonpross.

If plaintiff gives notice of trial, and neglects to enter his cause in due time, and defendant enters a ne recipiatur, to prevent his entering it afterwards, defendant is entitled to his costs for plaintiff's not proceeding to trial, because plaintiff is guilty of a default.

If plaintiff gives notice of trial, and defendant also gives notice of trial by proviso, and neither goes to trial, both shall

pay costs.

And if defendant has obtained costs for not going to trial, and plaintiff gives notice a second time, without paying such costs, on motion, the proceedings will be stayed till those

costs are paid.

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But costs for not proceeding to trial will not be allowed, where plaintiff is guilty of no wilful laches; as where he is prevented from proceeding from some unforeseen accident to his witnesses, for these costs are only sounded upon neglects; nor will defendant be entitled to costs in such case, when plaintiff's delay arises from defendant's own neglect, as from his not attending to strike his twelve out of a panel of forty-eight special jurors.

Vide feveral cases under the above title in the first volume.

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Of Costs of WITNESSES—where A RE-PLEADER is awarded—where A SPECIAL JURY—and where A NEW TRIAL.

THE Common Pleas allow costs of a material witness who attended, though he was neither subpæna'd nor examined; but the King's Bench do not allow costs of any witness, however material, if he was neither subpæna'd nor examined.—But in both courts the costs of a material witness, who was examined, though not subpæna'd, will be allowed, as will the costs of such witness subpæna'd, though he never attended.

As to costs where a repleader is awarded, the rule is to allow costs to neither party, because both are guilty, the one in tendering an immaterial plea, the other in joining issue upon it.

"The party who applies for a special

" jury, shall pay the fees for striking the 3 Geo. 2. 0. 25.

" same, and not be allowed them on taxa- s. 16.

" tion of costs."

This statute only extending to the fees for striking a special jury, the courts held, that the other costs relative to such jury, should attend the verdict; but as this was frequently burthensome and oppressive, it was afterwards enacted,

"That the party applying for a special jury shall also pay the expences thereof;

" and shall have no further allowance for

" the fame, than he would be entitled to

" in case of a common jury; unless the judge

after trial shall immediately certify in

" court, upon the back of the record, that

" the cause was proper to be tried by a

" Special jury."

Costs of a former trial, when a new trial is ordered, are in the discretion of the court, and wholly depends upon cr-cumstances.

When a new trial is granted for any other cause than upon the merits, costs are usually ordered to abide the event of the new trial; when granted upon the merits of the cause, the condition of paying the costs of the former trial is usually annexed.

But if a plaintiff refuses to be nonfuit, contrary to the opinion of the judges, a new trial (if granted) shall be without costs. So where he submits to a nonsuit, in compliance with the erroneous opinion of a judge, the nonsuit shall be

fet afide without cofts

24 Geo. 2. c. 18.

Of Costs where the Cause is made a REMA-NET, OR GOES OFF BY CONSENT, OR IS REFERRED TO ARBITRATION.

ATHERE the cause was made a remanet to another of attending the latter affizes: whereas the King's Bench Times, the Common Pleas used to allow only the costs allowed the costs of both. The practice of the Common Pleas, however, in this particular, agrees now with that of the King's Bench .- And it is held in both courts, (though formerly otherwise) that in all cases where a cause goes down to trial, and goes off upon any occasion without fault, contrivance, or management of either party, and is afterwards brought to trial, the costs of such former abortive going to trial, shall be taxed and allowed, to the party finally prevailing, as if the cause had gone off on a remanet.

Arbitrators, under an order of nisi prius, have a power to award cofts of the fuit, as well as of the arbitration. But if they only award costs generally, costs of the reference ought not to be allowed on the taxation, but only the costs of the

Arbritrators, if the reference be under a bond for fubmitting to an award, cannot award costs subsequent to the bond; though under an order of nisi prius, they may award costs subsequent to the reference. But arbitrators, under a reference without an order, can only award costs to the time of the reference.

However, if a verdict is taken for a certain fum for fecuring the damages and costs, upon an order of reference at nist prius, and the arbitrator ascertains the damage, he cannot award the same to be paid without costs, because con-

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When Proceedings shall be stayed till a responsible Plaintiff, or Security given for Costs.---When a second Action shall be stayed till Costs of a former are paid; and of deducting the Costs of one Action out of Another.

THE practice of granting a rule to flay proceedings till a responsible plaintiff be named, or security given for costs, holds but in two cases, viz. ejectment, and qui tam actions.

In ejestment, when it is on the demise of an infant, or when the lessor of plaintiff happens to die, or when the lessor of plaintiff resides abroad, or when the action for messe profits is brought in the name of the nominal plaintiff.

In a qui tam, when plaintiff's refidence is not known, or

he appears to be a fictitious person.-

But in no other case, will the courts grant such rule; not even if it appears, that plaintiss is a foreigner residing abroad, or a person resident in Scotland; who, as to our courts, is

the same as a foreigner.

And as to the practice of granting a rule to stay proceedings in a second action till the costs of a former are paid, that also holds good only in Ejectment; except in some cases under particular circumstances, as where the second action appears quite vexatious, and when the merits have been fully and impartially tried on the first.

In *Ejectment*, the courts will grant fuch rule, as well when the fecond action is brought in a different court, as in the fame. And as well where there was a *nonfuit* in the former action, or a *nonpross*, as if the merits have been tried; and even if the plaintiff unnecessarily harrasses or vexes the

defendant.

But if lessor of plaintiff is in custody under an attachment, for non-payment of the former costs, no such rule will be granted, because such attachment is in nature of a ca. sa.— Nor will they grant such rule for plaintiff, when a defendant, against whom a verdict in the former action was had, brings a new ejectment himself.

But a rule was made to ftay proceedings in a fecond action, brought by a peer, who refused to pay the costs of a former

nonfuit for the same cause.

When Proceedings SHALL BE STAYED TILL A RESPONSIBLE PLAINTIFF, OF SECURITY GIVEN FOR COSTS .--- When a SECOND ACTION SHALL BE STAYED TILL COSTS OF A FORMER ARE PAID; and OF DEDUCTING THE COSTS OF ONE ACTION OUT OF ANOTHER.

It is now univerfally admitted, that the court may make a rule in cross actions, for deducting the costs of one action out of another; and such rule has been granted in several inflances, especially since the statutes of sett-off; being founded in reason, justice, and equity.

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embers of the property of the parties of the property of the p till and the test are to prome are product that allies the event only in a camera a carrie in lone care, make in the remain happen, or where the levely belief appare out which have some arous a court and their takes and there are then SA of many live expuss our research of same of fiction is broaders a afterest court as in the frame, And as well allege there was a contact in the born wood weld attend and he is a born a to been tried to and the first plants someofferily barrages of vexes the

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Of Costs where Plaintiff sues in FORMA PAU-PERIS, and where AN INFANT SUES BY GUARDIAN OR PROCHEIN AMI.

THE stat. 23 Hen. 8. c. 15. enacts, that paupers being plaintiffs, shall have process and counsel of charity, and not-be compelled to pay costs, but shall suffer other punishment, at the discretion of the judges.

While the plaintiff continues to fue in forma pauperis under the admission of the court, he is not liable to costs; but if he is vexatious, as not proceeding to trial pursuant to notice, or the like, defendant may move to have him

dispaupered, and then he will be subject to costs.

An infant, suing by guardian or prochein ami, is not liable to costs, as said in Cro. Ell. 33. and Stra. 708.—But in 1 Barnes, 105. held, that the prochein ami of an infant is liable to costs: and if it appears, that the prochein ami named, is not of sufficient ability to pay costs, the court, on application, will order another to be named.—But an infant defendant, defending by guardian, pays costs if verdict pass against him.

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### Of Costs where PLAINTIFF SUES OR DEFENDS AS EXECUTOR OF ADMINISTRATOR.

PLAINTIFFS fuing as executors or administrators are not within the statutes giving costs to defendant.—But executors and administrators when defendants, pay costs in all cases as other defendants.—And they shall have costs, when as defendants judgment is given for them.

But when they are plaintiffs, they pay costs of a nonpross, or for not going to trial pursuant to notice, because they are guilty of a laches—but not if nonfuited at the trial, or if judgment pass against them, as in case of a nonfuit; or if

they withdraw the record before trial.

Upon a discontinuance by an executor or administrator, it is discretionary in the court to give leave, with or without paying costs; but if it appears, that they knowingly brought their action wrong, the court will annex the condition upon

payment of costs, to the rule to discontinue.

Note, As to executors or administrators paying costs when plaintiffs, the uniform rule is, that when they can fue in their own right, and yet bring the action quaterus executors or administrators, and fail therein, they shall pay costs as other persons; but if they could not bring the action otherwise than as executors of administrators, though they fail therein, not through their own default, they shall not pay costs. For executors and administrators are not excused from paying costs by the letter of the statutes, but by a very favourable construction thereof; as being prefumed to have no knowledge of the affairs of their testators. As in affumpsit by an executor, for money had and received to his use as executor, if he be nonfuited, he shall not pay costs; for he could not sue but as executor, and it is not material, whether the money was received by the defendant fince the testator's death or before. -But if he bring trover and conversion, for a trover and conversion in his own time, and be nonsuited, then he shall pay costs, for in such case he need not name himself executor; and the goods are affets in executor's hands, though he never recover them. There I so nell torner of ameron in rendered the first bearing

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# Of Costs where Officers are Defendants, and where Officers are Plaintiffs.

PERSONS acting under the authority of the 43 of Eliz. to fuits brought against them, may plead not guilty, or make avowry, cognizance, or justification; and if there shall be a verdict for them, or plaintist be nonsuited, defendants shall recover treble damages with costs.

If the jury neglect to affess the damages, or assess only small damages, a suggestion to entitle desendant to treble damages

and costs may be entered afterwards upon the roll.

"If any action upon the \* case, trespass, battery, or false imprisonment be brought against any justice, mayor, or bailist, of a city or town corporate, headborough, portireve, constable, tything-man, or collector, it shall be lawful for all such, and others, acting in their aid, assistance, or by their commandments, to plead the general issue, and give the special matter in evidence; and if such amounts in law to a discharge, and verdict shall pass for defendants, or plaintist becomes nonsuit, or suffers a discontinuance, the justice, judge, &c. before whom the matter shall be tried, shall allow defendants double costs."

7 Fac. 1. c. 5.

The benefit of this act is extended to churchwardens, fworn-men, and overfeers of the poor, and others acting in their aid, &c. by 21 fac. 1: c. 12. s. 2.

Note, If verdict pass for defendant, he must get a certificate from the judge, that the action was brought against him for something done in the execution of his office, in order to entitle him to double costs under these acts.

These acts extend to deputy constables, and persons acting

under a warrant.

On the other hand, many statutes give costs against officers prosecuting suits, or informations upon a seizure of goods, if they fail therein; to which statutes I must refer the reader, with this remark, that all statutes inslicting costs are construed strictly.

This means only actions on account of some temporal act done, and whereto defendant is enabled to plead the general is but it don't extend to a nonfeasance, as for not admitting a person to vote, or for a malicious presentment in an Ecclesiastical Court.

Of Costs, where Plaintiff sues as common Informer, Prosecutor out TAM, or as Party Grieved.

COMMON informers, or profecutors qui tam (who are looked upon as common informers) are in no case entitled to costs, unless costs are given by the statutes on which they sue. And as they could not recover costs otherwise, it followed, that if they were nonsuited, or if defendant had a verdict pass for him, he could not have costs for the vexation, (unless the statute intitled plaintiff to costs) either by the statutes 23 Hen. 8. or 4 Jac. 1. because neither of these statutes give costs to a defendant except in such actions, wherein plaintiff might have recovered costs. But to redress disorders in common informers, it was enacted,

"That if any fuch informer, or plaintiff, shall willingly delay his fuit, or shall
difcontinue, or be \* nonfuit, or shall have
the trial or matter pass against him by
verdict, or judgment of law, such informer,
or plaintiff shall yield, satisfy and pay
unto the party defendant, his costs, charges
and damages, to be affigned by the court
in which the same suit shall be attempted;
for recovery and execution whereof,

18 Eliz. c. 5. f. 3. fig. 35 4. th

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" other cases of execution.
" Provided, that this statute shall not extend to any officer, who in respect of his office, has heretofore used to sue upon penal laws, nor to officers suing for

" fuch defendant shall have his ca. fa. fi. fa.

" or elegit to be awarded unto him, as in

matters only concerning their office.

This statute extends to one suing, as well on a repealed statute, as on a statute in force, for the vexation is the greater: so it extends to one suing on a statute in a court not having jurisdiction.

And it extends, as well to fubsequent penal statutes, as those

which were in being when it was made.

<sup>.</sup> So, if plaintiff enters a nolle prosequi, it comes within the statute.

Of Costs, where Plaintiff sues as common In-FORMER, PROSECUTOR QUI TAM, Or as PARTY GRIEVED.

So it extends to informers qui tam, pro domino rege; &c. if they are nonfuited, discontinue, or delay their suit, or have verdict, or judgment of law (in which judgment upon demurrer and arrest of judgment are included) pass against them, they shall pay costs, if the statute on which they sue gives them costs if they had prevailed. Although objected that the king, who was entitled to a moiety, pays no costs; for such actions are not to be considered as prosecutions by the king, although he is to have a moiety.

This statute however, does not extend to actions on penal statutes, by the party grieved;—so that under this statute, the defendant shall not in the cases before-mentioned, have costs of such party.—But under the 4 Jac. 1. c. 3. a desendant shall have costs of such party grieved; if by the statute, the party grieved would have been entitled to costs had he prevailed.

The party grieved, we have seen, may recover costs [under the statute of Gloucester] in some cases, upon penal statutes, although costs are not mentioned in the statute on which he sues. As if he sues on the Riot Ast, 9 Geo. 1. for burning or demolishing his house, if he recover he shall have costs; because, before the statute of Gloucester, in such case he would have been entitled to damages. So on that statute, if the party grieved sails, he shall pay costs. But if the duty is uncertain as to recover treble damages, as upon the statute of waste, or statute 2 Edw. 6. for not setting out tythes, there plaintiff shall not have any costs.

But note, If in a subsequent statute a penalty is given to a common informer, and the party grieved happen to bring the action, he must bring it as common informer; and if no costs

are given by fuch statute, he shall recover no costs.

#### Of DOUBLE TREBLE Cofts.

PLAINTIFFS may recover deable or treble coffs, as well as double or treble damages, given by a statute, though the flatute makes no mention of costs, provided that damages. re recoverable in such action before the flatute of Gloucefler.

For instance, by a Hen. L. c. 1 - double damages are given to a plaintiff, who has been fued in the admiralty, for a thing done on land, and no mention is made of rofts. Now, if plaintiff prevails in an action founded on this flatute, besides." his double damages, he shall have double coffs. a Because ar common law, an action lay for fung in a court, not having"

So the 8 Hen. 6.110. 9. gives treble damages for a forcible" entry, and is filent as to costs; but on this statute, if plaining

So, for a refcue on the 2 5 3 W. S. M. c. 5, treble damages" are given; and because single damages in such case were reco-" verable at common law, there shall be treble costs also,

On the other hand, if a subsequent statute gives damages. double or treble, and is filent as to costs; if no damages were recoverable in the action before the flatute of Gloucefter, the

plaintiff prevailing, though he shall have such damages as are given, whether double or treble, yet he shall have no costs. As in an action on 1 & 2 P. & M. for driving a distress

out of the hundred, five pounds penalty and treble damages are given, but no cofts. Ergo; upon that flatute, no cofts are recoverable, because there is no mention of costs; and no damages were recoverable in fuch case at common law.

Note, Where a flatute gives double or treble costs to certain persons, if they prevail in fuits brought against them for matters done in their office, if leave is given to plaintiff to discontinue in his action against them, the court may insert the condition as to the payment of costs in the rule.—If the plaintiff is nonfuited before defence made, by fuch officer, &c. then the way is to enter a fuggestion on the roll with leave of the court, to entitle the party to his double or treble costs. -But if a verdict pass for such defendant at the trial, then the judge ought to indoffe on the nifi prius record, that defendant was fued for a matter done in his office to entitle him to fuch cofts.

Note also, That double or treble costs, mean double or tre-

cont descadants, although they make accepted for a return.

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### Of Cofts in REPLEVIN.

In splicin, and the action of second deliverance, being a species of the action of trespass, damages were recoverable by Plantarier before the flatute of Glaucester; ango, since the making of that strate costs are recoverable also. But avorants, or defendants in replacin for a long time could recover no costs. However it was enacted,

That every susuant, and perfor or per
for, making avoury, cognifiance, or

justifying as baily to any perfor in replegiaris at found deliverance, for rent, custom, or service, if their avoury, cognifance, or justification be found for them,
or plaintiffs in the faid actions be otherwife barred, shall recover their damages
and costs, as the plaintiffs should have
done if they had recovered." " done if they had recovered."

This statute only mentioning rent, custom, or service, was extended to "perform fone avowing, making cognisance, or justifying for damage statem, or for other rent or rents, upon any distress taken in any lands or tenements; and if the same avowry, cognisance; or justification, be are found for them, or the plaintiffs in the same be nonsuit, or otherwise barred, then they shall recover their damages and costs against the said plaintiffs, as the same plaintiffs should have done or had, if they had recovered." " If they had recovered."

21 Hen. 8. 0

organistation of the

These statutes give damages and costs only to persone avowing, making cognisance, and justifying for rents, customs, fervices, or for damage feafant. So that they don't extend to a avowry for a nomine parne, or for an eftray; and therefore if in fuch cases damages and costs were given, the judgment must be reversed on error being brought.

Executors and administrators having power of making avowry, [by the 32 Hen. 8. c. 37.] although such power was given them subsequent to the above statutes, are nevertheless

held to be entitled to costs under them.

If plaintiff has judgment against him upon a plea in abatemunt, defendants, although they make suggestion for a return, we not entitled to cofts.

VOL. IL.

# Of Coffs IN WASTE, FOR NOT SE

But a defendant avowing for an americant by a court

But if avowant in replevin plead property, he cannot re-

cover cofts under these statutes. To have a wall nomines The " joined defendant may have a writ of sen-h & are to write plant quiry; or in case he be nonfuit after iffue note to small only joined or werdice pass against him, they avoid out ni but " jury may enquire concerning the fum of my called an in himina "the arregrages of rent, and value of the 10 ministration of goods and cattle diffrained; and there. 17 Care 2. 6 2011 therwise for te-fa. I issualings guidam infras to turned a noque we that the chabled plaintiff to segment for the arrest and the fact as no through a street of shoot and the street of the street of

" unto, with full cofte of fuit. So if delinings alderstoom to " fendant avowing or making cognizance before 45w " for rent have judgment on demurrer."

"Laftly, perfons may avow or make about quinting its ec cognisance generally (without setting out

" title) for rent, relief, heriot, or other Tr Ga. 2. 6, a fervice distrained for. And if plaintiff in 19 f. 22.

" fuch action shall become nonfact, discon-" defendant shall recover double costs."

Note, In replevin both plaintiff and defendant are actors, therefore either party may carry down the cause; and if the defendant give notice, and do not go on to trial, the court will give costs against him for the same reason defendant may not move for judgment of nonfuit, unless the plaintiff have given notice of trial in yband

in all actions for not fetting forther a for ring, converies where wherein the fingle value or dame erreid to nages found by the jury that not exceed waity to nobles, the plaintiff obtaining was the judgment adgments or any award of execution 8 & 9 12 ther plea pleaded, or demurrer joined or more all motions hall recover his soft; and if he begome with hell power and organ, elemninus, or have weeder tagoen f. tot of me reverticales as delendant finall recover his cofficient.

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Of Costs in Replevi Of Cofts IN WASTE, FOR NOT SETTING FORTH TYTHES, in SCIRE FACIAS, and But if avowant in replevin plead proper to the talling q

A T common law, an action of waste lay against tenant in dower, or a guardian—and (as it seems) tenant by the urtely; therefore as damages were recoverable in such action, the flatute of Gloucester, with they shall have costs also ---And in the above cales, defendant shall have costs also of hintiff if he falls, under the ftat. 4: fac. too enupre your yron

The flatute of Gloutefter, consider however extended the therwise for term of life, or for years, or a woman in dower, and enabled plaintiff to recover the thing wasted, and treble lmager. But as no mention was made of cofts, costs were of recoverable against tenant for life, or years, in waste, till was enacted, fordant avoving or making cognizance

in Franchise judgmen " That in all actions of wafte, the plainiff obtaining judgment, or any award of another willed execution after plea pleaded, or demurrer was an and an army oined, shall recover cofts; and if plaintiff 8 & 9 W. 3. e newfait, or fuffer discontinuance, or if c. 11. f. 3. als against him, defendant shall it was words it and necover his cofts, and shall have execution of aven 20 aunit for the fame by ca. fa. fi. fa, or elegit." ever ser flame an shue so

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As to not fetting out tythes, no action lay for such neglect the 2d & 3d of Edw. 6. which gave no costs, so no dendant under the 4 of fac. 1, because none recoverable min by plaintiff. But to remedy this, in to solion apage aver

"In all actions for not fetting forth tythes, wherein the fingle value or darages found by the jury, shall not exceed menty \* nobles, the plaintiff obtaining indement, or any award of execution, after plea pleaded, or demurrer joined, hall recover his costs; and if he become muit, discontinue, or have verdict against , defendant shall recover his costs; and have execution by ca. fa. fi. fa. or elegit."

8 8 9 W. 3, c. 11. /. 3.

A noble is 6 s. &d .- Twenty make 61. 121. 4d. Damages

Of Coffs in WASTE, FOR NOT SETTING FORTH TYTHES, in SEIRE FACIAS, and PROBLETION, PROHIBITION.

Danieges not being recoverable in feire fatigiono costs could be recoverable therein; none by plaintiff under the statute of Glaucetter, or other flatute; and none by defendant under the 4 Jac. 1. because plaintiff could recover no damages in a feire facion before. But to remedy this statute of the facion before and the statute of the facion before and the statute of the facion of the facion

"In all fuits upon writs of faire facints on the standard of the plaintiff obtaining judgment, or any award of execution after plea pleaded, or in tad To demurer joined, thall recover his rofts; defourer or 11. Favor and if he become nonfait, discontinue, or 11. Favor base verdid against him, detendant thall returned to the property of the cover his cold.

baue verdid against him, determined by mining it bes to

" ca. fa. fi. fa. or elegit."

Upon quashing a scine sacias by plaintist himself, or upon a plea in abatement to a scine sacias, if plaintist moves for leave to quash his writ, he shall not pay costs; because the law is the same in scine sacias as in that of any other writ; in which if the writ be abated, plaintist is not liable to costs.

Executors or administrators [defendants] in a furt upon scine sacias, are not liable to pay costs to plaintist, if he provails, nor shall they when plaintists in scire sacias pay costs when defendant prevails.

The feature 2d & 3d of Edw. 6. c. 13. prescribes a was for any party fuing for a probibition, to any suit in the King Ecclesiastical courts for tythes, or offerings in any of the King courts, where prohibitions have been used to be granted and ordains, in case the fuggestion be not proved true in the court where the prohibition shall be granted within fix month ofter, that then the party hindered of his fuit in the Ecclefia fical court by the probibition, shall upon request, without de lay, have a consultation granted, and shall recover double to d damages against the party who had sued the prohibition the faid costs and damages to be affested by the court when the confultation shall be granted; for which costs and damag the party may have an action of debt.

It is not necessary, that the suggestion should be proved precisely; for if it appears from the proof, that the Ecclesiastic court ought not to hold plea of the matter, that is sufficient Nor need the fuggestion be proved within the fix month when the party is ordered to declare, for then the proof is

the at the trial.

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Of Cofts in WASTE, FOR NOT SETTING FORTH TYTHES, in SCIRE FACIAS. PROHIBITION. ROHIBITION.

Defendant is not entitled to double cofts under this statute. for want of proving the suggestion within fix months, un-

Notes Coffs by this statute are only given to defendant in prohibition, when plaintiff fails in proving the fuggestion.
But no costs were given to plaintiff in any case, nor to defendant in any other case, till it was enacted, in the ni

" That in all fuits upon probibitions, the filminiq on " " plaintiff obtaining judgment; for any x2 to brawe " award of execution, after plea pleaded, io reviewed "

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" or demurrer joined, thall recover his cofts; 8 6 9 W. 3.c. " and if plaintiff thall become nonfuit, dif 11. f. 3.

" continue, or have verdict against him, the and 19 voor " defendant shall recover his costs, and at at a a

have execution by ca. fa. fi. fa. or elegit.

It has been held that coffs, under this flatute, shall be taxed from the suggestion, so as to take in the costs of the motion. But in a late case in the Common Pleas, it was held, that costs hall be only from the time of making the rule for the writ of prohibition absolute. iminuferators det

The statute only extends to cases after plea pleaded, or demurrer joined: But if plaintiff have judgment as to part of what is in iffue, he is entitled to his cofts, although defendant have a consultation as to the relidue. So, if defendant obtains a verdict for part, he is entitled to costs, and was a rains a verdict for part, he is entitled to costs, and was a rain and a

courts, where prohibitions have been used to be granted and ordains, in case the suggestion be not proved true in the court where the prohibition first be granted within fix mante after, that then the party hindered of his fuit in the Each theal court by the probibition, shall upon request, without de lay, have a confultation granted, and shall recover double to

the faid costs and damages to be assessed by the court when the conjugation that he granted; for which costs and damage

the party may have an action of aebt. Is is not necessary, that the factorial mould be proved pre engly; for if it appears from the proof, that the Balchafin strang ought not to Eld blea of the matter, that is fulliced

Nor need the fage first be proved within the fix month where the party is ordered to declare, for then the proof is Defendan

be at the trial.

#### Of Costs in Error.

Of Colts in Error.	Of Code in
THE first mention of costs in error is in the	he 3 of House
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nonluits or discontinuances it was enected for	are discovered
other bound by any judgment, before exe-	me and the state of
cution, lue any writ of error to reverie	Service of the service of
et that then, if the lame undament be offermed	se tother defect
" or the writ of error discontinued, or party	es against the
" or the writ of error discontinued, or party fuing error be nonfuted:—the person	bommis 3d . 10.
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before whom the laid writ of error is	qualhing a con
ances on the judgment, or delaying the figure	tering continu
This flatute only giving cotts to defendant	of judgment ti
the writ was brought before execution, it was	s provided.
and That no execution shall be flaved upon	to defendants l
error brought in certain cales, foide anti-	bring error.
title Bail in Error, where requisite, p. 2601	enached
unless plaintiff in error put in bail for dour-	Water Too
" of error with effect; and also to satisfy and	4 /46. 1. 6. 8.
pay, if judgment be affirmed, the debt. da	W she faid in
pay, if judgment be affirmed, the debt, da- mages and cofts adjudged upon the former	" affirmed, in
TURE THE THE SAME SAME AND INCOME.	RECEIVED AND STREET
to segmented tot deraying execution.	ss the defendant
It is now held, that cofts are recoverable of ment be affirmed, notwithstanding cofts were	
in the original action. as we came and not not	side second
Executors or administrators bringing error.	air hat light to
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recon, and fuch sugardent le levered, present	brings error th
any perion profecute error for rever- fal of judgment after a verdut in any court of record at Westminster, counties palatine, or great sessions in Wales, and the said judgment be affirmed, such per-	statutes 3 Hen.
court of record at Westminster, counties	of aminance
be faid independent leftions in Wales, and	13 Car. 2. 12.
son thall pay to detendant in error double	and the many
rais, to be allelled by the court, where	she coffs of his
Puch writ of error thall be depending for	EXPERT OF
the delay of execution."	The second
II4 TABLE	The

# Of Costs in Error.

The above statutes only extending to the cases of offirmance of judgment, nonfuit, or discontinuance; it was enacted for preventing vexation by defective writs of error, as the control of the control of

" other defect, the defendant shall recover, 4 & 5 Anne, c.

" against the plaintiff issuing such writ, his 16. J. 25.
" costs as he should have had if judgment

" be affirmed. "oling ani-

Defendant in error thall be allowed the costs of his motion, as well as the other costs under the 4th & 5th of Anne, upon quashing a defective writ of error; but otherwise, if the defect of the writ was occasioned by his own acts, as by entering continuances on the judgment, or delaying the figning

of judgment till the writ of error is spent.

The above statutes give costs to defendants in error; [the plaintiffs in the original action | but no costs are thereby given to defendants below, if the plaintiffs in the original action bring error. But to give fuch defendants relief it was

enacted,

title Bail in Error, where requilde, 9. " That if, after judgment given for the unisig delnu." defendant in any action, the plaintiff or dear mul ent eld mandant fhall fue any writ of error, and disw rous lo " " the faid judgment shall be afterwards mebuili year " " affirmed, or the writ of error be difconti-" nued, or plaintiff shall be nonsuit therein, 8 & 9 W. 3.c. " the defendant or tenant in every fuch writ, 11. J. 2. " shall have judgment to recover his costs jed won a st against such plaintiff or demandant, and mains ad man have execution for the same by ca. far for tanigino out of Executors or administrators bringing error" dista Plate to

If defendant below has judgment, and plaintiff below brings error thereon, and fuch judgment is reverled, plaintiff can only have the costs of the original action; because the flatutes 3 Hen. 7. and 8 5 9 W. 3. extend only to the case of affirmance of judgment; and the court above, on reversal of a judgment, only gives such judgment as the court below ought to have given; and consequently, as no costs are given by any fratute in such case, the plaintiff can have but the cofts of his original action. ... to be affeld by the cofts of his original action.

" fuch writ of error thall be depending for the delay of execution."

## T of Alt in Brank E

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